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Corporate Mobility in EU Law

Mobilita společností v právu EU

Master Thesis

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Date: 8 September 2013

Prague, 2013

DECLARATION

I hereby declare that I have written this master thesis on my own, that I have duly referred to all the sources and literature used, and that this master thesis was not used to obtain any other academic degree.

In Prague ……..…. Signature ……..……

ACKNOWLEDGMENTS

I would like to thank my supervisor, doc. Mag. phil. Dr. iur. Harald Christian Scheu, Ph.D. for the extraordinary patience, understanding and trust that he has rewarded me with throughout the process of creating this thesis, as well as for his professional guidance and valuable advice.

I would also like to thank my Leuven teachers, especially Professors Koen Lenaerts, Wouter Devroe, Katlijn Malfliet and Maria Wyckaert, who have inspired me to continue my quest for knowledge in the vast and awe inspiring world of European law.

My gratitude is well deserved by Mgr. Dita Bustová who kindly agreed to proofreading the thesis and the thesis abstract in Czech.

Finally, I would like to thank my parents for their care, dedication, and love in my upbringing.

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List of Abbreviations

3rd Directive	Directive 78/855/EEC of 9.10.1978 on domestic mergers
10th Directive	Directive 2005/56/EC of 26.10.2005 on cross-border mergers
11th Directive	Directive 89/666/EEC of 21.12.1989 on disclosure requirements in respect of branches
14th Directive	proposal from 1997: Doc No XV/D2/6002/97-EN REV.2 on transfer of corporate seat
AG	Advocate General
CJEU, the Court	Court of Justice of the European Union / European Court of Justice
EP	European Parliament
EU	European Union
GmbH	Gesellschaft mit beschränkter Haftung
MS	Member States
SARL	Société à Responsabilité Limitée
SE	Societas Europeae
SL or SRL	Sociedad de Responsabilidad Limitada
SLNE	Sociedad Limitada Nueva Empresa
TFEU	Treaty on the Functioning of the European Union
UG	Unternehmergesellschaft – start-up company
US	United States (of America)

1. Introduction

Contrary to what one might expect of a liberalized Internal Market, autonomy in choice of corporate law in the European Union has been slow in coming. The Treaty of Rome provided that the conditions governing the recognition of companies and their cross-border mobility could be determined through secondary legislation, nonetheless, the 1968 Convention on the Mutual Recognition of Companies and Bodies Corporate[1] was not ratified by all of the Member States and thus failed to enter into force.[2] The failure of this Convention resulted in a long hiatus in the development of corporate mobility.[3] Until the end of the twentieth century, there was no secondary legislation concerning the governing law of companies and their cross-border mobility, and the Court of Justice of the European Union (hereinafter 'the Court' or 'CJEU') exercised uncharacteristic judicial caution in its *Daily Mail* judgment in which a UK company was denied permission to relocate to the Netherlands (see Chapter 3).[4] This state of affairs allowed the Member States to retain their traditional private international law rules concerning companies, including provisions that restricted choice of corporate law.[5]

The recent decisions of the CJEU in the cases *VALE*[6] and *Cartesio*[7] have once again put the steering question of the corporate mobility within European Union in the centre of the attention (see Chapters 3.4 and 3.5). Given that earlier cases on the free movement of companies are often controversial and creating a complicated puzzle where some types of free

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[1] EC Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968, Bulletin of the European Communities, Supplement 2/69, pp. 7-18.

[2] For academic commentary, see Robert R. Drury, 'The Regulation and Recognition of Foreign Corporations: Responses to the Delaware Syndrome', The Cambridge Law Journal, Volume 57, Issue 01, March 1998, pp. 165, 181-182; Tito Ballarino, 'Sulla mobilità delle società nella Comunità Europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie' (2003) Rivista delle società 669, 670; Alberto Santa Maria, 'European Economic Law', Kluwer 2009, p. 10; Justin Borg-Barthet, 'The Governing Law of Companies in EU Law', Hart Publishing, Oxford, 2012, pp. 106-9.

[3] Justin Borg-Barthet, 'Free at last? Choice of corporate law in the EU following the judgment in Vale', International & Comparative Law Quarterly, I.C.L.Q. 2013, 62(2), © 2013 Cambridge University Press, p. 503.

[4] Case 81/87 The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECR 5483.

[5] Stephan Rammeloo, 'Corporations in Private International Law: A European Perspective', Oxford University Press, 2001, pp. 36-37; Tito Ballarino, 'From Centros to Überseering: EC Right of Establishment and the Conflict of Laws', Yearbook of Private International Law, 2002, pp. 203-208.

[6] Case C-378/10 VALE Építési kft. [2012] ECR 00000.

[7] Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9614.

movements are safeguarded by EU law and some are not, any new decision is awaited with excitement. The aforementioned decisions paved the way for the relatively new type of cross-border transactions, namely cross-border conversions. Previous case law dealing with the corporate mobility together with secondary legislative acts has formed a doctrine that is considered substantive but far from being complete.[8] Therefore, each new decision on the subject matter contributes to development of the concept, but also raises the need to re-examine the entire doctrine of corporate mobility within the acquis. The aforementioned decisions, particularly the *Cartesio* case, as well as the topic of corporate mobility in general, have been covered by the available literature, however the focus of the authors was mainly centered upon the interpretation of the concrete decisions, omitting the importance of the implications that these decisions have for the fundaments of the doctrine – the thesis strives to analyze and bring forward these implications.

Although we might argue that corporate mobility has reached a certain level of maturity in Europe and the EU legal framework is established and well understood, resting largely on case-law from the Court, it appears that completely unbridled freedom of establishment will be sacrificed in order for the Court to salvage a semblance of consistency from a number of contradictory judgments.[9] In particular, it is unlikely that the CJEU will develop the case law to its fullest logical conclusions, which would be to do away with the real seat theory in its entirety, as this would contradict case law that has been confirmed repeatedly by the Court. Beginning with the influential *Centros* decision, the Court has effectively opened the borders between EU Member States little by little, and entrepreneurs now de facto have the right to select the foreign corporate law that governs the legal form of their company, at least at the company formation stage. Moreover, researchers have begun to empirically study how the case-law has impacted the market and how the market has reacted. While much effort has

[8] Eddy Wymeersch, 'Is a Directive on Corporate Mobility Needed?', European Business Organzation Law Review (2007) 8, pp. 161-169; Erik P.M. Vermeulen and Joseph A. McCahery, 'Understanding Corporate Mobility: Towards the Foundation of European Internal Affairs Doctrine', Working Paper Prepared for the 5th European Company Law and Corporate, Governance Conference in Berlin on 27-28 June, 2007, emphasize the complicated nature of the corporate mobility doctrine in European Union.

[9] Justin Borg-Barthet, 'Free at last? Choice of corporate law in the EU following the judgment in Vale', International & Comparative Law Quarterly, I.C.L.Q. 2013, 62(2), © 2013 Cambridge University Press, p. 505.

been spent evaluating the early market reactions, following the partial market opening made possible by *Centros*, relatively little attention has been devoted to subsequent developments.[10] This is surprising because the various lawmakers' responses to the wave of entrepreneurial migration offer a rare glimpse at the effects of regulatory competition and subsequent business' reaction, as well as providing insights into the relevance and effects of lawmaking and regulatory responses to market pressure. The thesis also focuses on this practical and scarcely analyzed aspect of corporate mobility doctrine changes in EU law (see Chapter 5.2).

Corporate mobility is a fascinating and dynamically evolving subject with a direct impact on the European corporate world and therefore on the lives and welfare of the European citizens. At this point, I would like to acknowledge the specific nature of this topic, which can be described as a concatenation of concepts, rules and mechanisms pertaining to three major fields of law – EU law, corporate law, and international private law. Given the limited extent of the thesis, a comprehensive review that would explore the issue in the light of all three aforementioned disciplines would be detrimental to the added value of the work and would result in a rather superficial analysis of the current developments in corporate mobility. This logic has prompted me to focus on the problematic predominantly from the standpoint of EU law, with only minor research and observations of the corporate and international private law aspects of the subject. A further limitation of the scope of the thesis, that I would like to clarify in the introduction, concerns the inherent divisions within the topic – the thesis deals with re-incorporation mobility rather than incorporation mobility, and within the re-incorporation niche the stress is placed on cross-border conversions rather than cross-border mergers (see Chapter 2.2 for an explanation of the division). This delimitates the research topic distinctly and predefines the content of the thesis, which attempts to provide a detailed research of current developments in the cross-border conversions and define the problematic issues at hand.

[10] Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition', University of Oxford Legal Research Paper Series, Paper No 34/2013, June 2013, p. 3.

1.1 Literature Selection Strategy

The body of literature related to the corporate mobility doctrine and related case-law is extensive, therefore I set two crucial criteria that served as a selection parameters. Firstly, I identified the articles directly related to the aforementioned decisions (*VALE* and *Cartesio*), dealing with their legal interpretation and wider legal implications with regard to corporate mobility doctrine. Secondly, I determined the articles concerning the foundation of corporate mobility in order to position the topic in the wider legal subject matter that it belongs to. After thorough revision of the abstracts I pre-selected a body of 25 articles that are used as the material research basis of the thesis. The total number of articles used, as may be noted throughout the text of the thesis and in its literature review, is higher due to a high number of tangential scholarly articles, which were used to complete and chisel the analytical output of the work. These complementary sources of literature have been added to the final selection list mainly due to the innovative approach they provided, thus inherently alluding to the most preponderant current scholarly opinion and therefore to the likely course of future developments in the analyzed field.

As the amount of articles directly dealing with cross-border conversions is rather scarce, I will examine articles centered upon the issue of corporate mobility in a more general manner, embedding the concrete topic within the wider subject matter it belongs to. The thesis is based on critical appraisal of the opinions, views and remarks of the most reputable authors conducting research in the field of European Company Law. Hence, I selected body of literature that covers mainly the research of the following authors: John Armour, Justin Borg-Barthet, Carsten Gerner-Beuerle, Joseph A. McCahery, Oliver Mörsdorf, Federico M. Muciarelli, Phillip Pellé, Stephan Rammeloo, Wolf-Georg Ringe, Erwin R. Roelofs, Karsten Engsig Sørensen, Marek Szydlo, Erik Vermeulen, Gert-Jan Vossestein, Andrzej Wiśniewski and a number of other scholars.

1.2 Steering Question and Underlying Hypothesis

The cornerstone that purveys relevance and meaningfulness to the thesis, as well as guides both the author and the reader towards the comprehensive understanding of the subject taken into focus, is the research question. It is of utmost importance to pose this steering question and underlying hypothesis, which will outline the point of view in which the topic shall be tackled, in the very beginning of the text. Hereby I would like to present the steering question:

'How did the recent decisions of CJEU concerning the cross-border conversions influence the corporate mobility doctrine formulated by prior acquis and whether further legislative actions have to be taken in order to enable companies to take advantage of these developments?'

Subsequently I have developed the underlying hypothesis:

'The consistency of the corporate mobility doctrine as formulated by the prior acquis is diverging in the light of newly established developments of cross-border conversions. As a new institute, such a development cannot be based merely on the CJEU case law and Articles of Treaty on Functioning of European Union (hereinafter TFEU), as they lack general rules and legal clarity that is indispensable for actual use of the aforementioned developments.'

1.3 Outline of the thesis

The thesis is divided into five logical clusters which are structured in the following manner. Firstly, I analyze the fundamental pillars of corporate mobility, liability and capital protection doctrines that serve as the tangential object of interest to the actual subject matter as they represent the wider legal framework of European company law. In this regard, I focused my attention on the review of available literature that directly relates to cross-border conversions and strive to explain the basic concepts pertaining to this legal area. Secondly, I try to comprehensively summarize the preceding case law of the Court on the issue of freedom of establishment, providing an insight on the current issues, which are thoroughly discussed and analyzed in the remainder of the thesis. In Chapter four, I continue to dissect the VALE case and reflect on the implications the case had on the corporate mobility doctrine as well as the

problematic issues that it left unresolved. In the fifth Chapter, I ponder over the aforementioned developments in a broader context by taking into consideration the scholarly interpretation as well as empirical studies that have been conducted to assess the impact of the relevant CJEU decisions on the legislation of the member States and the behavior of companies within the EU. Part of this chapter is a brief description of the changes in the national legislation of France, Spain, the Netherlands, Germany, the United Kingdom, and Austria as a direct reaction to the developments in EU Law regarding corporate mobility. Lastly, I summarize the arguments used throughout the analyzed body of literature in order to evaluate the need and nature of changes that are expected from the European legislator in the near future.

2. Corporate mobility – A General Overview

The importance of corporate mobility resides in the economic implications stemming from such a phenomenon. The starting point of the discussion was expressed by McCahery and Vermeulen in their article 'Understanding corporate mobility':

'Corporate mobility yields a significant improvement in the performance of European firms and hence boosts the confidence in the economic growth within EU as depicted in the objectives of the Lisbon treaty to create the most dynamic and competitive information-based economy'.[11]

Such a statement, however, has to be supported by the underlying economic rationale, which would prove the relevance of the concept with regard to EU economy. In layman terms – any decision of such major impact on legislation economical modus operandi of Member States has to pass the necessity and beneficence test. Are the costs of interference with this aspect of the European commercial and economic status quo covered by the benefits that are presumably gained from the implementation of such a doctrine? According to Carrhuthers,[12] unhampered corporate mobility facilitates the optimal allocation of resources within European Union. Put simply, supposing that the companies are free to choose the location of their establishment, they can effectively match their individual preferences to the location (Member State) which best correlates with company's individual needs. In theory, the corporate mobility option is therefore presumed to enhance performance of the companies and as such creates a quintessential requirement for maintained competitiveness of the EU economy.

In practice, on the other hand, there are no empirical studies that would unequivocally confirm the causal occurrence of such an effect on the EU economy. Morsdorf claims that especially the case law of CJEU has led to a high level of corporate mobility within the EU.[13] Empirical studies, however, prove that the level of corporate mobility is rather low and

[11] Vermeulen and McCahery, supra note 8, p. 2.
[12] Janeen Carruthers et al., 'Company Law in Europe – Condoning the Continental Drift?', European Business Law Review, 2000, p. 92.
[13] Oliver Morsdorf, 'The Legal Mobility of Companies within the European Union through Cross-border Conversions', Common Market Law Review 49, 2012, p. 631.

involves mainly start-up companies with very short-term vitality, therefore we might argue, that the current effect of the corporate mobility on the EU economy is in fact negligible.[14] It must be noted, however, that the outcome of empirical studies, cannot be interpreted as to lead to the conclusion that corporate mobility is not an effective concept or that there is no demand for it. More precisely, it merely indicates that the concept of corporate mobility at present still involves restrictions and ambiguities, leading to a companies' reluctance to take full advantage of their rights subsumed under the freedom of establishment. The demand for corporate mobility was amongst others confirmed by the survey of Directorate General for Internal Market and Services published in Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union summary report of July 2006, in which almost 80% of the respondents considered that there is still need for a Directive on transfer of registered office that would have an important impact on the practical matters concerning cross-border conversions.[15]

2.1 Business and Legal Mobility

The reasons underlying companies' demand for corporate mobility are either business-related or law-related. Companies may wish to locate or re-locate their seat (usually only their real seat) due to more favorable conditions such as geographical position, more qualified or cheaper labor force and other inputs which incentivize the location of the business.[16] Rammeloo defines mobility motivated by aforementioned reasons as business mobility.[17] On the other hand, companies may also act upon the desire to take advantage of more favorable

[14] William W. Bratton, Joseph A. McCahery, and Erik P. M. Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis' (January 2008). ECGI - Law Working Paper No. 91/2008; Georgetown Law and Economics Research Paper No. 1086667; Amsterdam Center for Law & Economics Working Paper No. 2008-01. Available at SSRN: http://ssrn.com/abstract=1086667

[15] Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union summary report of July 2006, available online at http://ec.europa.eu/internal_market/company/consultation/index_en.htm

[16] Pierre Larouche, 'Legal Emulation between Regulatory Competition and Comparative Law', April 23, 2012, TILEC Discussion Paper No. 2012-017. Available at SSRN: http://ssrn.com/abstract=2044679, p. 8.

[17] Stephan Rammeloo, 'The 14th Company Law Directive on the Cross-Border transfer of the Registered Office of Limited Liability Companies – Now or Never?', Maastricht Journal of European and Company Law (2008) 15 p. 364

legal regulation in the given Member State, be it a better suited company law or for instance less stringent environmental law (legal mobility). As Szydlo states the legal reasons might also include better judicial service, provided by the host Member State.[18] Supposing that the companies are incentivized by the first set of reasons, the actual establishment of the company in the chosen state will naturally involve the physical placement of its activities in the given Member State. On the other hand, if the company would opt for the second set of incentives (legal-related reasons), the establishment of the company in the chosen Member State may be merely formal, without any pursuit of business activities in the host Member State.

2.2 Incorporation and Re-incorporation Mobility

In general, corporate mobility doctrine involves two types of companies' establishment. Firstly, the incorporation mobility refers to the choice of entrepreneurs to incorporate new firms in whichever state they consider as most attractive according to their business activities or legal system (incorporation mobility). Existing companies, once incorporated in one Member State that decide to re-incorporate in another Member State during their lifetime fall under the second type, being referred to as re-incorporation mobility. A firm can decide to re-incorporate by:

1. Merging with a company in another Member State,
2. Converting to a different business form in a foreign Member State (cross-border conversion)

Incorporation mobility was enabled predominantly by CJEU decision in *Centros*[19] and subsequent empirical evidence confirmed that entrepreneurs immediately took advantage of the option created by CJEU judicature.[20] Conversely, re-incorporation mobility within EU

[18] Marek Szydlo, 'The Right of Companies to Cross-border Conversion under the TFEU Rules on Freedom of Establishment' European Company and Financial Law Review. Volume 7, Issue 3, 2010, p. 416.
[19] Case C- 212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, [1999] ECR I-1459.
[20] Marco Becht, Colin Mayer, and Hannes F. Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry', August 2007, ECGI - Law Working Paper No. 70/2006; Journal of Corporate Finance, Vol. 14, No. 3, 2008. Available at SSRN: http://ssrn.com/abstract=906066

was strictly rejected by most of the Member States, until the introduction of the Cross-border Merger Directive in 2005.[21] Since then, two CJEU decisions regarding cross-border conversions followed. However these decisions do not fully clarify the concept of cross-border conversions and its admissibility on various cases that can occur.[22]

As explained above, the development of the corporate mobility doctrine may be justified by positive economic consequences it purports to have, although the economic results according to the empirical studies are so far negligible. Nevertheless the apparent demands from the business community speak in favor of the further development of corporate mobility doctrine.

2.3 The Current Legal Framework on Corporate Mobility

From a practical point of view, entrepreneurs can currently form a company in a Member State of their choice ('home Member State') and subsequently carry out business with this company in another jurisdiction ('host Member State'). The host Member State has to recognize the legal capacity and the legal characteristics of this company as such – this means that the rules of company law pertaining to internal organization, legal status, liability of directors, etc, are all governed by the law of the home Member State (see Chapter 3.1). From a legal perspective, the company has to set up a branch in the host Member State, which has to be registered in the register of the host Member State in accordance with the rules laid down in the 11th Company Law Directive.[23] Although technically a branch, this may de facto be the 'head office' or even the sole place of operation for the entire company. In this case, the company keeps nothing more than a registered office in the home Member State ('letterbox company', see Chapter 3.1).

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[21] Federico M. Mucciarelli, 'Company Emigration and EC Freedom of Establishment: Daily Mail Revisited', European Business Organization Law Review (2008) 9, p. 277.

[22] Jesper L. Hansen, 'The Vale Decision and the Court's Case Law on the Nationality of Companies', October 29, 2012, European Company and Financial Law Review, Vol. 1, 2013; Nordic & European Company Law Working Paper No. 10-32. Available at SSRN: http://ssrn.com/abstract=2168092

[23] Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State [1989] OJ L395/36.

The present case-law sets limits, however, for existing companies wishing to emigrate into another Member State.[24] For this reason, cross-border mobility so far has been confined only to the stage of company formation. There has not been any serious 'midstream' migration of existing companies. The possibility of a relocation of an existing business is still to some degree uncertain, due to ideological gaps in the Court's case law.[25] This aspect of mobility has, rather, been the realm of legislation – after the Commission officially dropped the plans for the proposed 14th Directive,[26] the European Parliament has repeatedly tried to revive the project,[27] and the Commission has now initiated a public consultation on the case for such a directive.[28] However, within the existing body of law, the Cross-Border Mergers Directive[29] and Article 8 of the European Company Statute (SE)[30] currently provide for the only means of moving an existing business across the border without being dissolved or having to register as a new company. The recent *VALE* case illustrates that the case-law developed by the ECJ may help in some situations (see Chapter 3.5).

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[24] Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition', University of Oxford Legal Research Paper Series, Paper No 34/2013, June 2013, p. 5.

[25] Wolf-Georg Ringe, 'No Freedom of Emigration for Companies?' (2005) 16 European Business Law Review, p. 621.

[26] Fourteenth Directive of the transfer of the seat from one Member State to another (proposal from 1997: Doc No XV/D2/6002/97-EN REV.2). Commissioner McCreevy announced in October 2007 that he would not proceed with the Directive (Speech at the European Parliament's Legal Affairs Committee, 3 October 2007, Speech/07/592), largely due to the availability of cross-border mergers under Directive 2005/56/EC (n 15).

[27] European Parliament, Committee on Legal Affairs, 'Draft Report with recommendations to the Commission on cross-border transfers of company seats' 2008/2196 (INI) of 17 October 2008. More recently, European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)), and report of 9 January 2012.

[28] Consultation on the cross-border transfers of registered offices of companies (January-April 2013), see http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies (December 2012), at 4.1.

[29] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1.

[30] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), [2001] OJ L294/1.

Even at formation stage, where *Centros* and other cases have facilitated foreign incorporations, things did not develop as smoothly in the beginning, as there was much legal uncertainty as to the exact borderlines between permissible and abusive behavior on behalf of the Member States. This was largely due to the question as to whether the 'real seat' theory was in any way influenced by this judgment. The real seat theory is a conflict-of-laws rule, determining the law applicable to companies (the *lex societatis)* according to the company's head office or 'real seat', which was subscribed to by a number of EU Member States (see Chapter 2.3.1). Without going into the detail at this point of the thesis, this theory was applied in a way detrimental to corporate mobility which made it de facto impossible for foreign companies to register in a Member State, but do business exclusively in another Member State which followed the real seat theory.

Notwithstanding this impediment, with every free movement judgment handed down from Luxembourg, enterprises became increasingly assured that the freedom of establishment indeed allowed them to register in Member State A, while conducting their business exclusively in Member State B. In this manner, the Court has created a market for corporate forms within the European Union, granting entrepreneurs de facto a choice between the legal forms of Member States.

2.4 The Problem

2.4.1 Corporate Mobility and the 'Conflict of Laws' Theories

Corporate mobility as a general right of companies is in EU law mirrored in the freedom of establishment stipulated in Article 49 Treaty on Functioning of European Union (hereinafter TFEU). The given article however merely precludes Member States from imposing mobility restrictions on those companies that are not considered to be their nationals (those companies that do not have genuine connection with the given Member State). The conceptual framework of freedom of establishment and the rights of companies that could be subsumed therein were left to be developed by case law and secondary legislation.

According to article 54 TFEU companies come to existence only by virtue of the national law of the Member State under which they are formed. This concept was confirmed in the Daily Mail decision, in which the Court defined companies as creatures of national law.[31] As derived from TFEU and case law, Member States are free to stipulate requirements of companies' existence and functioning. The companies can enjoy the freedom of establishment granted by TFEU only if they were formed in compliance with the national law regime of a given Member State.

Article 54 further states that companies shall be for the purposes of freedom of establishment treated in the same way as natural persons. This provision sets the primary legal guarantee for the free mobility of companies, which is defined as equivalent to the mobility of persons within the area of the Internal Market.[32] However, the nature of the company as a legally construed entity differs significantly from the inherent characteristics of natural persons. This discrepancy renders the mechanisms set for the freedom of establishment and mobility of natural persons inapplicable to companies in a wide specter of issues. In an attempt to locate a certain company's whereabouts, it is important to distinguish between its 'registered office' (siege statutaire), the place, where the company is formally organized and its 'real seat', the place where the central management of company resides. Member States are generally free to decide, what constitutes a connecting factor between Member State and company and thus determine the law applicable to the organization of the company (*lex societatis*).

Regarding this, two basic 'conflict of law' theories are recognized. Firstly, the real seat theory, according to which the nationality of a company is determined based on the location of its real seat, meaning the actual center of the company's management. Second, the incorporation theory, according to which the nationality and applicable law of a company is determined by the place of its incorporation, in this case the Member State in which the company was legally formed. Mucciarelli, however, emphasizes that this is only the rough distinction and various legal systems that are classified as belonging to the same theory might employ very different practical solutions, which sometimes cannot be described as clearly

[31] Daily Mail, supra note 4, para 19, confirmed in Cartesio, supra note 7, para 104.
[32] Werner F. Ebke, 'Real Seat Doctrine in the Conflict of Corporate Laws', 36 International Law, 1015, 2002.

pertaining exclusively to one of the aforementioned doctrines. Similarly, Hansen further contends that in practice many states actually use elements of both doctrines when defining the connecting factor for the determination of *lex societatis*. None of these theories however were designed with a view to effective corporate mobility during the lifetime of the company. The incorporation theory in its purest form does not consider the change in nationality of the company in the company's lifetime, as the only applicable law is the law under which the company was formed. The real seat theory, on the other hand, requires the actual transfer of center of the management to another Member State in order to change the applicable law. Particularly the real seat theory is often blamed to create impediments for a dynamic and simple process of corporate mobility. The disproportionate manner in which authors discuss the desired abandonment of real seat theory has indeed overshadowed the equally disturbing drawbacks of the incorporation theory. In my view, both of the theories are capable of creating obstacles to corporate mobility, therefore, there is an urgent need to develop a new concept, which would be construed with the aim to effectively enhance corporate mobility, if we are to pursue the positive economic consequences intended by the construction of a free Internal Market.

2.4.2 Corporate Mobility and Diverging Substantive Company Laws

Whereas the incorporation mobility introduced by the *Centros,*[33] *Uberseering,*[34] and *Inspire Art*[35] do not face significant obstacles, the re-incorporation mobility is believed to be severely hampered. In fact, re-incorporation mobility within EU was strictly rejected by most of the Member States, until the introduction of the Cross-border Merger Directive in 2005.[36] Recent decisions in *VALE* and *Cartesio*, introducing the cross-border conversions further emphasized the legal issues related to re-incorporation mobility.

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[33] Centros, supra note 19.
[34] Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR I-9943.
[35] Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003] ECR I-10155.
[36] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

Re-incorporation of the company is undoubtedly a rather challenging transaction, as the direct consequence of re-incorporation transaction is the change in applicable law. Lombardo contends that if the company is understood as a nexus of contracts among constituencies of the company (shareholders, creditors, managers, and other stakeholders), re-incorporation transactions, giving effect to change of lex societatis, indirectly amend all the contracts among the given constituencies.[37] Particularly creditors', minority shareholders' and employees' position may be deterred supposing that the new applicable law provides a lower standard of their protection. The clash of two substantive laws that grant different standards of the stakeholders' protection is of eminent importance to the concept of re-incorporation mobility as it allows Member States to restrict freedom of establishment by invoking the general interest. According to case law of CJEU, the need to protect creditors, minority shareholders and employees is generally perceived as a justified general interest, although the restrictions on freedom of establishment must be of non-discriminatory, proportionate and indispensable nature.[38] However, this *ad hoc* system of restrictions on re-incorporations based on different standards of stakeholders' protection of home and host Member State might create considerable legal uncertainty and provide a loophole for Member States to arbitrarily restrict the freedom of establishment, effectively blocking corporate mobility in practice. The companies may not know ex ante, whether the Member States (home or host) will invoke such restrictions in individual cases and factually frustrate the transaction.

The presented differences in substantive company law of Member States and their opportunity to effectively use these differences in order to obstruct cross-border mobility (re-incorporation mobility in particular) lead to the conclusion that a certain level of harmonization is indispensable also in this domain.[39] However the extent of the harmonization is also dependent on the extent of the competences the primary law has granted to the European legislator in this field.

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[37] Stefano Lombardo, 'Regulatory Competition in the Company Law in the European Union after Cartesio', European Business Organization Law Review, 2009; 10(04), pp. 627-648.
[38] Case C-411/03 SEVIC Systems, par. 26 and 27-28, Case C-12/92 Kraus, par. 32, Case C-55/94 Gebhard, par. 37, Centros, supra note 19, para 34.
[39] Geert T.M.J. Raaijmakers, Thijs P.H. Olthoff, 'Creditor Protection in Cross-border Mergers: An Unfinished Business', Utrecht Law Review, Volume 4, Issue 1, 2008, pp. 35-39.

2.4.3 The Problem of Autonomy in European Company Law

The CJEU has recognized repeatedly the fact that companies are creatures of the laws of the Member States. It follows that it is for the Member States to determine the conditions under which companies are established and remain in good stead.[40] This faculty of the Member States includes the ability to prescribe the connecting factors that are required of a company that is established under the laws of the relevant state. However, it does not follow that Member States retain authority to prescribe all of the conditions under which companies are established and operate in the European Union. The rights of Member States are tempered by the ability of individuals to benefit from the opportunities offered by a liberalized internal market. Thus, a balance is to be struck between the rights of States to regulate companies and individual economic freedoms.[41] The balance between State rights and individual autonomy is especially problematic in the private international law of companies because, unlike many other areas of civil and commercial law, the role of States and individuals in the regulation of companies remains particularly controversial. The difficulty that the Court faces, and which, as will be further explained in the thesis, the Court has yet to resolve, stems in part from the lack of harmonization of company law, as well as the underlying reasons for lack of harmonization.[42] In particular, the Member States have failed to establish a common understanding of the structure of company law due to different views concerning the interests that are to be safeguarded by corporate law.[43] Quite surprisingly, even the very nature of companies is unsettled in corporate legal theory,[44] as are the implications of different understandings of the company for corporate law and the private international law of

[40] Daily Mail, supra note 4, para 19; Überseering, supra note 11, para 40; Cartesio, supra note 7, para 104; Case C-371/10 National Grid Indus [2011] ECR I-0000, para 26; VALE, supra note 6, para 29.
[41] Justin Borg-Barthet, 'Free at last? Choice of corporate law in the EU following the judgment in Vale', International & Comparative Law Quarterly, I.C.L.Q. 2013, 62(2), © 2013 Cambridge University Press, p. 510.
[42] Clive M. Schmitthoff, 'Company Structure and Employee Participation in the EEC-the British Attitude' (1976) ICLQ p. 611.
[43] Gian Antonio Benacchio and Lesley Orme (trans), 'The Harmonization of Civil and Commercial Law in Europe', Central European University Press 2005, pp. 365-371.
[44] Oliver E. Williamson, 'The Theory of the Firm as Governance Structure: From Choice to Contract' (2002) Journal of Economic Perspectives, p. 171.

companies.[45] By way of example, some Member States, view corporate law principally as a discipline that is concerned with the relationship between shareholders and directors, whereas other States include other constituencies such as employees in their corporate governance arrangements.[46] United Kingdom is a prime example of the first group, whereas Germany is the paradigmatic example of the latter group. The distance between the Member States' legislation and underlying corporate legal theories rendered impossible the task of minimizing differences through harmonization of the core features of company law. As a result of these fundamental disagreements, contractual freedom in EU choice of corporate law remains controversial in the least.

While the Court has recognized this difficulty, the normative influence of European integration tends to outweigh considerations concerning divergent approaches to company law. The tool through which integration is achieved is economic liberalization. Consequently, the Court adopts an economically liberal understanding of the private international law of companies, which has been reflected in its latest decisions (see Chapters 3.4 and 3.5). However, given that the normative substructures are systemically distant from company law, it does not appear that the Court is fully engaged with the implications of the policy choices that are made through its judgments.[47]

[45] John Paterson, 'The Company Law Review in the UK and the Question of Scope: Theoretical Concerns, Practical Constraints and Possible New Directions' in Robert Cobbaut and Jasques Lenoble (eds), Corporate Governance. An Institutional Approach (Kluwer Law International 2003), p. 141.
[46] Werner F. Ebke, supra note 32.
[47] Advocate General Giuseppe Tesauro in Case C-214/89 Powell Duffryn plc v Petereit [1992] ECR I-01745, para 4.

3. The Preceding Relevant Case Law – a Comprehensive Research

Free mobility for companies across borders has been a long-standing dream for European businesses. One would imagine that the creation of the European Union – or its predecessors, the European Economic and the European Communities – with its concept of an 'Internal Market' and the instrument of 'freedom of establishment' for corporations would help this dream come true. However, it took over forty years from the inception of the EEC for the CJEU (in its famous *Centros* judgment) to allow for a certain limited freedom in this field.[48]

One of the early influential cases concerning the companies' right of freedom of establishment is the frequently cited *Daily Mail* (1988) case.[49] Although many of the findings and observations of the Court in the *Daily Mail* have been marginalized,[50] some findings of the Court are still applicable today. The most notable of these findings is that companies, contrary to natural persons, are 'creatures of national law' and 'exist only by virtue of the varying national legislation which determines their incorporation and functioning.'[51] As a consequence, companies cannot rely on the freedom of establishment to move their real seat away from the Member State of incorporation. *Daily Mail* thus started the debate concerning the different connecting factors enforced by Member States.

3.1 The Ground-Breaking Case of *Centros*

After a decade-long pause in the judicial activity concerning the freedom of establishment, the breakthrough in the development in this area of EU company law was brought forth by the *Centros* case.[52] In view of the lack of harmonization, prior to the 1999 judgment in *Centros*, several Member States applied the 'real seat' theory (e.g. Germany, Austria, and Hungary).

[48] Wolf-Georg Ringe, supra 24, p. 2
[49] Daily Mail, supra note 4.
[50] See, for example, the Courts' observation in paras 14, 18 and 20 of the Daily Mail decision seemingly permitting Members States to require the winding-up of the company before the removal of the central administration from their territory.
[51] Daily Mail, supra note 4, para 19.
[52] Centros, supra note 19.

This recognition theory requires companies having their operational headquarters within a given Member State to be established under the laws of that State. Default from this rule often resulted in the Member States' refusal to recognize the existence of the company. The rationale for this approach stems from the view that companies are concessions of the State and that the State with which they are most intimately connected should be able to prescribe their governance arrangements. It is an acknowledgment of the public function of companies. The 'real seat' theory is to be contrasted with the contractual incorporation theory, long-standing representatives of which are for example the United Kingdom, the Netherlands, and Denmark.[53] In keeping with contractarian theory, the incorporation theory favors party autonomy in choice of corporate law; it prescribes that a company should be governed by the law of the State in which it is incorporated. There is no need for the company to have its centre of administration in that territory, or indeed to operate in that territory at all (see chaper 2.3.1 above).[54]

In his Opinion preceding *Centros*, AG La Pergola suggested that freedom of choice in corporate law was necessary for the establishment of the Internal Market. He was of the view that the purpose of the Treaty provisions on freedom of establishment 'is to guarantee to all Community citizens alike the freedom to engage in business activities through the instruments provided by national law.'[55] It followed that 'it is the opportunity to exercise business activities that is protected, and with it the contractual freedom to make use of the instruments provided for that purpose in the legal systems of the Member States.'[56] The CJEU endorsed the Advocate General's Opinion in its judgment; however, it did not explicitly restate his remarks on the place of party autonomy in EU private international law of companies. This

[53] Justin Borg-Barthet, supra note 3, p. 507.
[54] For a detailed overview of the two theories, see Stephan Rammeloo, supra note 5, pp. 11-20; Justin Borg-Barthet, supra note 3, pp. 4-6, and 13-14.
[55] Advocate General Antonio Mario La Pergola in Case C-212/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] ECR I-01459 para 20. See also Tito Ballarino, supra note 5, p. 208.
[56] ibid., para 20.

marked the beginnings of a rapidly growing market for incorporations in the European Union.[57]

Mirroring the importance of the decision, the *Centros* case has been discussed in sufficient detail in a relatively large body of literature.[58] In summary, *Centros* effectively allows for choice of incorporation: entrepreneurs are free to form a company registered in Member State A while doing business exclusively in Member State B (the latter usually being their entrepreneur's home state). This means that for instance Czech entrepreneurs are no longer exclusively reliant on Czech company forms. They can form a company in any of the other EU (or EEA) Member States as a 'letterbox' company, which keeps nothing more than a registered office in that Member State, and does its business exclusively in the Czech Republic. To the extent that company laws diverge between Member States, there may accordingly be an incentive to choose any foreign company law for domestic purposes. The *Centros* case created a sudden awareness of the possibilities offered by the Internal Market, provoking a storm of academic literature[59] and corresponding business behavior that quickly adapted to the situation.

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[57] Marco Becht et al, supra note 20, pp. 241-242. Becht et al note that the United Kingdom experienced a 400 per cent increase in incorporations of companies that had their headquarters in other Member States after Centros.

[58] Wolf-Georg Ringe, 'Sparking Regulatory Competition in European Company Law: The Impact of the Centros Line of Case Law and its Concept of 'Abuse of Law'' in R de la Feria and Stefan Vogenauer (eds), 'Prohibition of Abuse of Law: A New Principle of EU Law?', Hart Publishing, Oxford, 2011, pp. 107-125; John Armour and Wolf-Georg Ringe, 'European Corporate Law 1999-2010: Renaissance and Crisis', 2011, 48 Common Market Law Review, p. 125.

[59] See for example Wulf-Henning Roth, 'From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law' (2003) 52 International and Comparative Law Quarterly 177; John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition' (2005) 58 Current Legal Problems 369; Wolf-Georg Ringe, 'No Freedom of Emigration for Companies?' (2005) 16 European Business Law Review 621; Mathias Siems, 'SEVIC: Beyond Cross-Border Mergers' (2007) 8 European Business Organization Law Review 307; Eddy Wymeersch, 'Centros: A Landmark Decision in European Company Law' in Theodor Baums, Klaus J. Hopt and Norbert Horn (eds), 'Corporations, Capital Markets and Business in the Law: Liber amicorum Richard M. Buxbaum', Deventer, Kluwer, (2000); Francesco Munari and Paolo Terrile, 'The Centros Case and the Rise of an EC Market for Corporate Law' in Guido Ferrarini, Klaus J. Hopt and Eddy Wymeersch (eds), Capital Markets in the Age of the Euro: Cross-Border Transactions, Listed Companies and Regulation (The Hague, Kluwer Law International 2002), p. 529; Erik Werlauff, 'Using a Foreign Company for Domestic Activities' (1999) 10 European Business Law Review, p. 306; Wulf-Henning Roth, 'Case Note on Centros' (2000) 37 Common Market Law Review, p. 147; Helen Xanthaki, 'Centros: Is This Really the End for the Theory of the Siege Reel?' (2001) 22 Company Lawyer 2.

3.2 *Überseering* and *Inspire Art*

The concept of unrestrained incorporation choice, first articulated in *Centros,* was later expanded and clarified. It should be noted, that in *Centros* both Member States concerned (United Kingdom and Denmark) were following the incorporation doctrine.[60] Hence the case did not concern the conflicting choice of law rules. The answer to the question whether this finding would still remain valid in a case where one of the Member States involved was following the real seat doctrine came in the subsequent *Überseering* case, where the Court made it clear that a host Member State cannot enforce the real seat theory against a company incorporated in a Member State that uses the incorporation theory.[61] Several commentators observe that thereby the Court in *Überseering* fundamentally changed conflicts of corporate laws within the EU.[62] Thus, it became obvious that Member States are not free to decide about the non-existence of companies validly incorporated under the law of other Member States.[63] the company would operate principally. In *Inspire Art* it was further held that Member States may not require pseudo-foreign companies to comply with their laws, thereby consolidating the emerging market for incorporations.[64]

Post-*Centros* case-law – mainly the cases of *Uberseering* (2002) and *Inspire Art* (2003) – supported and reinforced the liberal interpretation of the European treaty framework. It might be concluded that *Centros*, *Uberseering,* and *Inspire Art* signified a 'retreat from the high water mark'[65] of the findings of the Daily Mail case and were focusing on the question to what extent Member States have freedom to determine the status of companies incorporated in other Member States and the question when companies can rely on the freedom of establishment guaranteed by EU law.

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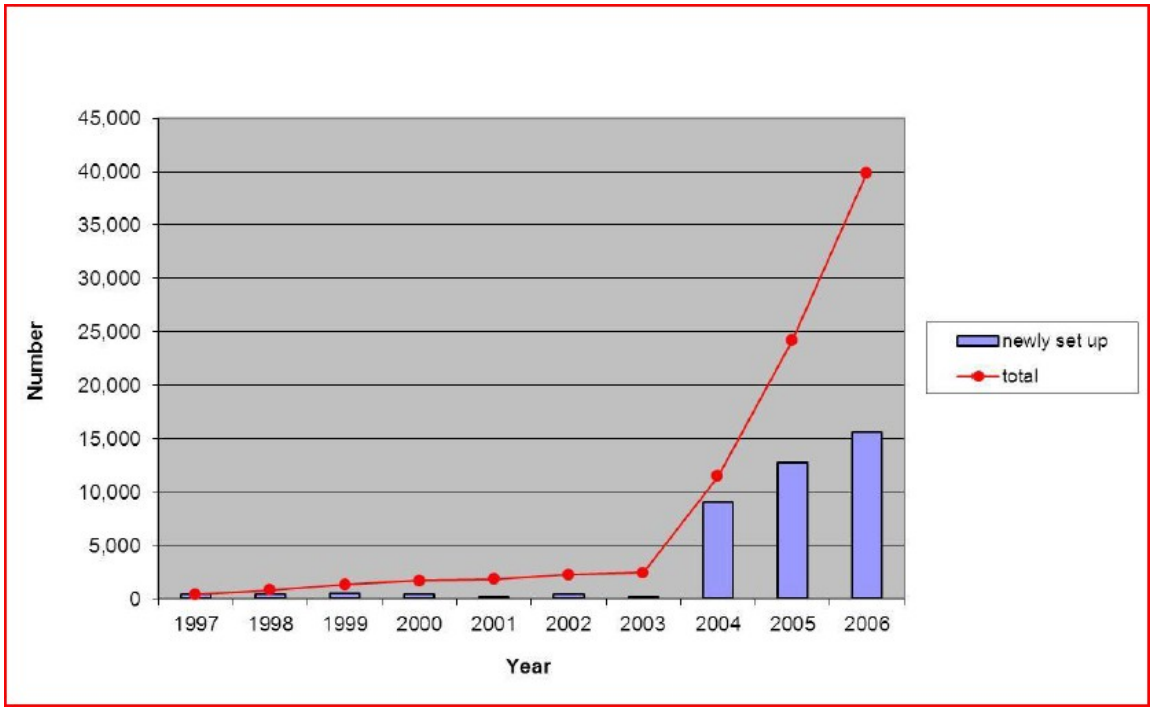
[60] Hanne S. Birkmose, 'A market for company incorporations in the European Union? Is Uberseering the beginning of the end?' (in: Tulane Journal of International and Comparative Law, Volume 13), p. 78.
[61] Überseering supra note 34, para 94.
[62] Werner F. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond' (in: European Business Law Review, 2005, volume 16, issue 1), p. 26.
[63] Andrzej W. Wiśniewski and Adam Opalski, 'Companies' Freedom of Establishment after the ECJ Cartesio Judgment' (in: European Business Organization Law Review (EBOR), Volume 10, Issue 4, 2009), p. 605.
[64] Inspire Art, supra note 35, para 135.
[65] John Armour and Wolf-Georg Ringe, 'European company law 1999-2010: Renaissance and crisis' (in: Common Market Law Review, Volume 48, Issue 1).

Rather surprisingly, the Court has not been consistent with its doctrine and in cases like *Cadbury Schweppes*[66] (2006) and *Cartesio*[67] (2008) (see below) limited the scope of the concept as it was postulated via *Centros*, *Überseering,* and *Inspire Art*. Nevertheless, it is safe to say that by the end of 2003, when the judgment in *Inspire Art* was handed down, market participants had a relatively clear framework of permissible cross-border mobility at hand, which prompted for a hike in both cross-border incorporation and re-incorporation, as shown in several empirical studies.[68] The graph below shows data comparable with the dynamics of most other European countries regarding newly set-up companies that are doing business exclusively in other EU countries.

Graph 1. New English Private Limited Companies Doing Business Exclusively in Germany[69]



[66] Case C-196/04 Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue 2006 ECR I-7995.
[67] Cartesio, supra note 7.
[68] Paschalis Paschalidis, 'Freedom of Establishment and Private International Law for Corporations', Oxford Private International Law Series, 2012.
[69] Marco Becht et al, supra note 20, p. 241.

3.3 *SEVIC*[70]

As mentioned above, the practical consequence of these judgments was that it became possible to incorporate a company in any Member State applying the incorporation theory and set up business in any other Member State as a branch. Member States where the branch is situated had to accept that they can do only little to regulate these branches. On the other hand, it was also apparent that for companies incorporated in Member States adhering to the real seat doctrine it is much more complicated to carry on business activity in another Member State. Therefore, the attention of practitioners and, as a consequence, of the Court seems to have shifted toward other methods for companies to carry on business activity in another Member State: cross-border movements involving some form of transformation.[71]

The first in this line of cases, the *SEVIC* case, deals with cross-border mergers. As *SEVIC* showed a striking departure from the previous direction of case law of the Court, several commentators asked the question whether the decision means a fundamental shift in the direction of the development of this area of EU company law.[72] Although the Court provides that difference of treatment between the merger of two or more domestic companies and two or more companies, at least one of which is not domestic, constitutes a restriction of the freedom of establishment,[73] it also clarifies that there can be imperative reasons in the public interest on the basis of which Member States are justified in restricting the freedom of establishment.[74] The Court, however, failed to address how specifically such cross-border mergers should take place, i.e. which procedures should govern these mergers. It is interesting to note that the *SEVIC* case allows cross-border mergers if such mergers are allowed in a national setting, and consequently, the Court indicated that Member States should allow cross-border restructuring and transformation to the same extent as they allow internal transactions. However, the impact of the case was dimmed by the fact that the Cross-border

[70] Case C-411/03 SEVIC Systems [2005] ECR I-10825.
[71] Dániel Gergely Szabó and Karsten Engsig Sørensen, 'Cross-border conversion of companies in the EU: the impact of the VALE judgement', 2013, LSN Research Paper Series, No. 10-33, p. 3.
[72] Andzej Wiśniewski, supra note 63, p. 608.
[73] SEVIC, supra note 70, para 23.
[74] SEVIC, supra note 70, paras 28-29.

merger Directive[75] was passed with only one month's difference of the judgment, and as a consequence most Member States seemed to assume that implementing this directive made up for compliance with *SEVIC*. Therefore few Member States adopted rules on, for instance, cross-border transformation in the form of transfer of seat.[76] Maybe Member States decided to wait for the adoption of the 14th Company Law Directive on transfer of seat, but the Commission chose not to press this directive, pointing out that they would await the effects of the Cross-border Merger Directive and the Court's judgments.

3.4 *Cartesio*[77]

Notwithstanding the fact that 13 years have passed after *Centros*, the fullest freedom for corporate decision-makers to choose the governing law of companies has not been forthcoming. While companies that are lawfully established under any Member State's law must be recognized throughout the Union,[78] Member States continue to retain the ability to restrict the movement of companies established under their own laws.[79] Indeed, subsequent judgments were far more nuanced than *Centros*, and the path to liberalization has not been linear. Nor has it been especially clearly demarcated.[80] In particular, the judgment in *Cartesio* drew the line at requiring Member States to allow existing companies to relocate to other Member States. It was held in this judgment that the Treaty provisions on freedom of establishment did not preclude national legislation that required companies to retain their operational headquarters in the territory of the Member State under whose laws they were established.[81]

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[75] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310/1, 25.11.2005.
[76] Manuel Garcia-Reistra, 'The Transfer of Seat of the European Company v Free Establishment Case-Law',European Business Law Review, 2004, p. 1295.
[77] Cartesio, supra note 7.
[78] Centros, supra note 19, para 7.
[79] Daily Mail, supra note 4 above, paras 21-23; Überseering supra note 34, para 69; Cartesio, supra note 7, paras 108-110.
[80] Justin Borg-Barthet, 'The Governing Law of Companies in EU Law' (Hart Publishing, Oxford 2012), p. 135-138.
[81] Cartesio, supra note 7, para 110.

Although the factual basis of *Cartesio* is not concerned with cross-border conversion, since the company in the case was incorporated in Hungary and wished to move its seat from Hungary to Italy without changing the applicable law, the Court goes on to address the situation in which a company transfers its seat together with 'an attendant change as regards the national law applicable.'[82] In such cases the Member State of origin is not justified in preventing the company to convert into a company governed by the law of another Member State (host state), to the extent that such a conversion is permitted by the law of the host Member State.[83] It is interesting to note that the Member State of origin is not even justified to require the winding-up or liquidation of the company, which constitutes an obvious break from the findings in Daily Mail.[84] Again, the Court failed to address in detail how the Member State of origin and the host Member State should facilitate such transactions. Therefore, again the Member States seem not to have taken positive steps to allow for cross-border conversion, and with this the scene was set for the Court's judgment in the *VALE* case.

3.5 *VALE*[85] in the Light of Previous Decisions

The recent judgment in *VALE*, which was delivered in July 2012, suggests that the Court is again on the road to liberalization. The importance of *VALE* goes beyond the narrow question that was decided in the judgment: whether Member States must allow the cross-border conversion of a company incorporated under another jurisdiction into a company form under domestic law if the national law provides for such a possibility in the domestic setting. The answer to this question was yes, which was not surprising in light of *SEVIC*, where the national (in this case German) merger law that only allowed domestic companies to merge was declared to be in violation of the Treaty. *SEVIC* was very brief in its discussion of

[82] Cartesio, supra note 7, para 111.
[83] Cartesio, supra note 7, paras 112-113.
[84] John Armour, supra note 64, p. 248.
[85] VALE, supra note 6.

whether the right of establishment was engaged[86] and focused on questions of justification. The Court in *VALE*, on the other hand, was able to develop the scope of Articles 49 and 54 TFEU against the backdrop of the more refined jurisprudence on corporate mobility.[87]

While the judgment in *VALE*, in line with the jurisdiction of the Court under Article 267 TFEU, does not offer much explicit guidance beyond answering the questions of the referring court, it allows several important and long-awaited observations with regard to the scope of the right of establishment and the recurring, elusive question of the relationship between the conflict rules determining the law applicable to cross-border transactions and the right of establishment guaranteed by the Treaty.[88] This question came to the fore with the above discussed *Centros* judgment, which prompted commentators in some Member States to conclude that the real seat theory was no longer applicable in the EU.[89] This assessment is correct in many respects, but it should be noted that the Court has never addressed the question directly and that the legitimacy of the real seat theory can only be explored within the framework of Articles 49 and 54 TFEU. Thus, Member States are free to apply the real seat theory, provided that the application of the theory does not restrict the primary establishment of a company in the Member State or the setting-up of agencies, branches or subsidiaries (secondary establishment).[90]

It is currently well established that the real seat theory can, accordingly, not apply in situations where a company has been formed in another Member State that applies the incorporation theory, i.e. requires for the valid formation and continued existence of the company only the location of the registered seat in its territory. If the company's central

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[86] The Court merely stated: 'Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment'. See SEVIC, supra note 70 para 19.

[87] Carsten Gerner-Beuerle, 'Right of establishment and corporate mobility: The decision of the court of justice in VALE', 2013, p. 4.

[88] Carsten Gerner-Beuerle and Michael Schillig, 'The Mysteries of Freedom of Establishment after Cartesio' (2010) 59 International & Comparative Law Quarterly, p. 303.

[89] Werner F. Ebke, 'Centros – Some Realities and Some Mysteries' (2000) 48 American Journal of Comparative Law, pp. 623, 627-628.

[90] Carsten Gerner-Beuerle, supra note 87, p. 5.

administration is in such a situation located in another State (as in *Centros*) or if it is later transferred to another State (as in *Uberseering*), the latter State may not call the company's existence into question by arguing that pursuant to its conflict of laws rules the company's siège réel had been transferred to its territory and the company was, consequently, required to comply with its national law. Similarly, if the company makes use of its right of secondary establishment and opens a branch in another Member State, that State cannot argue that the company was not validly formed under the substantive law that is applicable according to the real seat theory followed by the branch State. On the other hand, it is less clear that the real seat theory does not apply in outbound situations where the company's siège réel is transferred from a real seat country to another country that may or may not follow the incorporation theory.[91] In this case, the Court's Centros line of cases would not apply, but Daily Mail, which in principle acknowledges that the authority of the Member State of origin to determine the conditions under which companies are formed and function, falls outside the scope of Articles 49 and 54 TFEU.[92]

3.5.1 Changes in the Cross-Border Conversion Doctrine

The situation at issue in *VALE* is even more complicated because cross-border conversions and mergers are not clear inbound or outbound cases. They contain both elements of immigration and emigration and, consequently, fall in between the two branches of the Court's right of establishment jurisprudence: *Daily Mail* for outbound movements and *Centros*, *Uberseering*, and *Inspire Art* for inbound movements. They require the application, and reconciliation, of two national regulatory regimes, which must both be in compliance with the requirements of the right of establishment.

The starting point for the assessment of conversions under European law should be the principle of *Daily Mail*, confirmed in *Cartesio*, which holds that Member States under whose

[91] Alan Dashwood et al., 'Wyatt and Dashwood's European Union Law' (Hart Publishing, Oxford , 6th ed., 2011), p. 657.
[92] Daily Mail, n 4 above, para. 19.

national law the company is, or seeks to be, incorporated have 'the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status.'[93] In the context of cross-border conversions, it falls to the 'host' Member State to determine under which conditions the company can convert into a company governed by the law of that State. Where the new Member State permits the cross-border conversion, the Member State of incorporation is not able to prevent the company from 'converting itself into a company governed by the law of the other Member State' by requiring the winding-up or liquidation of the company.[94] In addition, as was held in *VALE*, if the receiving Member State allows conversions of domestic companies, it must also do so for cross-border conversions.

On the other hand, it is less clear to what extent the national laws of the Member State of origin and the receiving State are subject to scrutiny under the Treaty, apart from the points explicitly ruled on by the Court. First, let us examine the position of the Member State of origin. The decision to convert must logically be taken before a new legal entity governed by the law of the receiving State has been established. Thus, while the Member State of origin cannot prevent the company from converting into a company incorporated under the law of another Member State, it must be able to define the requirements that have to be satisfied for the conversion. In *VALE*, the decisions regarding the conversion that were taken in Italy would, accordingly, need to comply with Italian company legislation. The permissibility of the conversion as such, however, could not be called into question by Italian company law, and this, presumably, also not by arguing that the company's siège réel was intended to remain in Italy and that, accordingly, Italian law should continue to apply to the company. It is submitted that this case is to be distinguished from the one mentioned above where it was said that it may still be permissible to apply the real seat theory in outbound situations. The reason is the holding in *Cartesio*: If the company does not merely transfer its siège réel, but intends to convert into a company governed by the law of another State, i.e. if the law

[93] Cartesio, supra note 7, para 110.
[94] Ibid. para 114.

applicable to the company changes, and if the other State allows the transfer and attendant change of the applicable law without requiring dissolution and reincorporation, the first State is not entitled to prevent the company from reorganizing abroad. As far as the position of the receiving Member State is concerned, the following can be concluded.

From the perspective of the receiving State, the requirements for conversion are governed by its own laws. Thus, similar to the case of cross-border mergers, two legal regimes apply. The law of the receiving Member State determines the types of corporate form that are available and the requirements that have to be satisfied in order to convert into one of these forms, for example with respect to capital requirements or the company's governance structure. It naturally also determines the information that has to be included in the commercial register, for example the name and registration number of the predecessor in law of the company resulting from the conversion, as in the case of Hungarian law. It can be presumed that the receiving State may even require the real seat of the company resulting from the conversion to be located within its territory, i.e. it may apply the real seat theory. If both the State of origin and the receiving State provide for similar requirements, principles of private international law would generally stipulate that the stricter rules prevail.[95]

Consequently, if the receiving State imposes additional requirements, or stricter requirements than those that have already been satisfied under the law of the Member State of origin, the converting company would, in principle, need to satisfy these stricter requirements. This is in line with both *Daily Mail* and *Cartesio*: both judgments granted the State of incorporation considerable leeway in fashioning its corporate law regime. However, *VALE* has now clarified that, in spite of this leeway, the rules of the Member State of incorporation (here: the receiving State or, as the Court in *VALE* put it, the 'host Member State') fall within the scope of the Treaty provisions on the right of establishment[96] and must comply with the principles of equivalence and effectiveness.

[95] Bernhard Großfeld, 'Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Internationales Gesellschaftsrecht', de Gruyter, 1998, paras 683, 698-704.
[96] VALE, supra note 6, para 32.

3.5.2 On the Principles of Equivalence and Effectiveness

The Court pointed out that since there is no secondary law addressing how cross-border conversions should take place, i.e. it is up to national law in the Member State of origin and the host Member State to govern the process. Such national laws must comply with Article 49 TFEU, and the Court points out several requirements which national law must fulfill. First, Member States which make provisions for cross-border conversions must grant the same possibility to companies governed by the law of another Member State.[97] Second, even though the detailed procedural rules are a matter for national law, the principle of equivalence and principle of effectiveness must be applied.[98]

Taking these guiding principles into account the Court noted that it cannot be called into question that Hungary is allowed to apply the rules on national conversions governing the incorporation and functioning of the company. More specifically Hungary can require a company to draw up lists of assets and liability and property inventories before the conversion.[99] On the other hand, the refusal to record the Italian company as 'predecessor in law' did not comply with the principle of equivalence if such a record of a predecessor is possible to make in a domestic conversion.[100]

Next the Court spelled out how the principle of effectiveness affected national law.[101] The principle of effectiveness means that host Member State rules and practices are not allowed to 'render impossible in practice or excessively difficult the exercise' of the rights conferred by the free movement of establishment.[102] The practical effect of this principle is discussed by the Court in relation to the documents obtained by the predecessor company from the Italian authorities during the deregistration procedure. Here the Court proclaims that the host Member State must take due account of these documents, since these constitute an 'indispensable link between the registration procedure in the Member State of origin and that

[97] VALE, supra note 6, paras 46.
[98] VALE, supra note 6, para 48.
[99] VALE, supra note 6, para 52.
[100] VALE, supra note 6, para 56.
[101] VALE, supra note 6, paras 58-61.
[102] VALE, supra note 6, para 48.

in the host Member State',[103] enabling the cross-border conversion in practice. More specifically in this case the Court rules that the practice of the Hungarian authorities to refuse taking into account such documents in a general manner is contrary to the freedom of establishment. The host Member State is obliged to take due account of the documents issued by the authorities of the Member State of origin, despite that such an obligation would not be covered by the principle of equivalence. The principle of effectiveness is complementary to the principle of equivalence and seems to extend the host Member State's obligation in making cross-border conversions possible to account for the inherent differences in national and cross-border conversions.

Consequently, the receiving State is under an obligation to recognize, for example, a predecessor in law incorporated under another jurisdiction or documents that were issued abroad and that show the assets and liabilities of the converting company as required under national law. Again, this reflects a well established principle of private international law holding that a relationship or act required by a provision of national law may be substituted with a similar relationship or act originating in another state.[104] This principle is amplified by European Law in that relationships or acts fulfilled in another Member State are 'similar' and accordingly must be recognized by the receiving Member State for purposes of satisfying the requirements arising under that State's legislation if not doing so would render the exercise of the right of establishment 'excessively difficult'.[105]

[103] VALE, supra note 6, para 59.
[104] Erik Jayme, 'Substitution and principle of equivalence in Private International Law' (2007) 72 Annuaire de l'Institut de droit international, p. 73.
[105] Carsten Gerner-Beuerle, supra note 87, p. 7.

4. Implications of the *VALE* judgment

As described in the previous Chapter, in *VALE* the Court seems to have interpreted articles 49 TFEU and 54 TFEU as providing a firm legal basis for the right of cross-border conversions within the EU for all companies in a general manner, clarifying its earlier hypothetical reflections.[106] Simultaneously, it also proclaimed that restricting the right of companies to convert cross-border is only permitted for the host Member State on the basis of overriding reasons in the public interest. The real innovation of the Court lies in providing guiding principles on *how* the cross-border conversion should take place by the introduction of the principles of equivalence and effectiveness in this area.[107] These principles are certainly not new to EU law, and not even entirely new to this area of EU company law. In *SEVIC* the Court has indicated that rules for domestic mergers should also be applicable to cross-border mergers.[108] Admittedly, the Court in *SEVIC* has not used the term 'equivalence' and the complementary principle of effectiveness is completely lacking in that case.

The principle of equivalence means that national procedural rules designated to ensure the protection of rights acquired under EU law should be governed by domestic law of the Member State provided those are not less favorable than those governing similar domestic situations. The principle of effectiveness furthermore requires that such procedural rules are not allowed to render impossible in practice or excessively impede the exercise of the rights acquired under EU law.[109] Thus, whereas the principle of equivalence ensures that the Member State should use its existing rules on domestic conversion as a starting point, the principle of effectiveness may force Member States to deviate or adapt their domestic rules if that is necessary to make cross-border conversions possible. These principles have been used by the Court in its case law *inter alia* concerning right to damages and the right to recover

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[106] Some scholars observe that they have already been implied in the SEVIC and Cartesio cases. See, for example, Andrzej Wiśniewski, supra note 63; Veronika Korom and Peter Metzinger, 'Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06 ', European Company and Financial Law Review, Volume 6, Issue 1, 2009; Oliver Mörsdorf, supra note 13.

[107] Christoph Teichmann, 'Der Grenzüberschreitende Formwechsel ist spruchreif: das Urteil der EuGH in der RS. Vale', Der Betrieb, 2012.

[108] SEVIC, supra note 70, paras 14, 22, and 23.

[109] Dániel Gergely Szabó, supra note 71, p. 9.

unlawfully levied charges.[110] By virtue of these principles the company wishing to convert cross-border should be able to rely on the rules of the host Member State applicable to similar domestic conversions. This sounds, at first, rather clear and simple, but the introduction of the principles of equivalence and effectiveness in the area of EU company law in relation to cross-border conversions raises very difficult issues, both in terms of core company law and other legal areas, such as for example tax law. The principles of equivalence and effectiveness, in lack of supporting secondary legislation are extremely vague. One might even ask whether they solve the question how a cross-border conversion can take place or create further issues and uncertainties in this area. To illustrate this point, I will discuss the main issues raised by the judgment.

The first issue is related to what kind of domestic conversion exactly should the cross-border conversion be treated equivalently with. In this case an Italian limited liability company intended to be converted into a Hungarian limited liability company.[111] However, Hungarian law does not contain the possibility of a limited liability company 'converting' into the same type of company, and it is not likely that other Member States' company laws contain the possibility of such transformation either. Thus, strictly speaking, the principle of equivalence cannot be applied. This could mean that companies cannot convert cross-border into the equivalent company forms, only into other company forms, which have equivalent company transformations in a national setting of the host Member State. Obviously, such a reading of the findings in VALE are untenable, as the facts in the VALE case demonstrates that a conversion from a private company in one Member State into a private company in another Member State should be protected. Strictly speaking, this conclusion does not follow from the principle of equivalence, and must, thus, be contributed to the principle of effectiveness.[112]

The impact of the judgment seems not to be limited to conversions, as it could also cover other types of corporate reorganizations given that such reorganizations exist in a similar form in both the Member States involved. Most obviously this would cover the division of

[110] Takis Tridimas, 'The General Principles of EU Law', Second Edition, 2006, pp. 418-475.
[111] VALE, supra note 6, paras 9-10.
[112] Karsten Engsig Sørensen, supra note 71, p. 11.

companies which is a type of transaction that exists in several Member States.[113] But there may be other forms of reorganizations which will also be made possible in a cross-border setting.[114]

The second issue is related to the protection of the interests of creditors, minority shareholders and employees. It is not quite certain if the company law rules of the Member State of origin, the host Member State, or both simultaneously are to be applied. On the one hand, the Court clearly states that Hungarian legal provisions on the requirements to draw up lists of assets and liabilities and property inventories can be applied.[115] Hence the Court seems to confirm clearly that the host Member State's company law provisions related to company conversions apply, some of which are aiming to protect the interests of creditors, minority shareholders and employees. At the same time, the Court also provides that the host Member State's authorities must take due account of the documents obtained from the authorities of the Member State of origin in relation to the conversion.[116] However, in order to obtain such documents, the predecessor company has to comply with measures of the company law of the Member State of origin, some of which may be in place to protect the interests of creditors, minority shareholders and employees. Thus, indirectly the Court seems to enable the Member State of origin as well to apply its own company law rules applicable to company conversions. Besides, the fact that parallel application of two company laws can lead to a rather lengthy and costly process, it may also be outright impossible for the company to follow both company laws' provisions. Seemingly, the principle of effectiveness could take care of this problem,[117] but the question which company law should yield remains open. It is interesting to reflect on the fact that even if both Member States' company law rules on creditor and minority shareholder protection are to be applied, these rules may still not

[113] The 6th Company Law Directive (Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies) does not impose a duty to introduce divisions, as it only harmonizes the Member States' rules on divisions if such exist.
[114] For instance this would be the case concerning 'Eingliederung' which is known in German law.
[115] VALE, supra note 6, para 52.
[116] VALE, supra note 6, para 58.
[117] VALE, supra note 6, para 48.

provide adequate protection to creditors and shareholders of the predecessor company, since these measures are typically designed for national setups.

As pointed out above, it is possible in context of a cross-border conversion that the company law rules of both the Member State of origin and the host Member State apply simultaneously. This may cause an additional and unexpected burden for minority shareholders of the predecessor company. For example, Hungarian company law provides that shareholders of the predecessor company, if they are not becoming shareholders of the new company, are liable, at least to the extent of their share capital contributions, for the obligations of the predecessor company which are not settled by the new company, for five years after the conversion.[118] Transposed to this case, this means that the original Italian shareholders of the predecessor company incorporated and operating under Italian law may become liable for certain debts if not settled by the new company even though they as minority shareholders may have voted against the convergence. Obviously, this may cause dubious legal obligations and further uncertainty around cross-border conversions.

The third issue related to core company law, but stemming from the lack of procedural coordination between the Member State authorities was picked up by Advocate General Jääskinen.[119] This relates to the question when the predecessor company should be removed from the corporate register of the Member State of origin and when the new company should come into existence and be registered under the law of the host Member State. AG Jääskinen points out in his opinion that the predecessor company should still continue to exist at the legal birth of the new company, both under the host Member State law in *VALE*, the law of the Member State of origin and the corresponding EU law.[120] For this reason there needs to be coordination between different Member State authorities, otherwise they might 'drop the egg' between the removal of the predecessor company from the register and the registration of the new company. The facts in *VALE* illustrate this problem. VALE Costruzioni was removed from the Rome commercial register prior to the application for registration of VALE Építési

[118] 2006. évi IV. törvény a gazdasági társaságokról (Act on Business Associations of 2006), 70.§ (5)-(6).
[119] Opinion of Advocate General Jääskinen delivered on 15 December 2011 in Case C-378/10 VALE Építési kft. ECR 00000., para 52.
[120] ibidem.

in Hungary.[121] Thus, in this period VALE Costruzioni did not legally exist any longer, and VALE Építési did not exist yet. Luckily, the Hungarian courts regarded the application as a new company formation, thus granted VALE Építési the status of 'company in formation', which grants limited capacity to the company, before the final registration.[122] This is how VALE Építési was capable of starting the litigation about its registration. However, if the principle of equivalence was applied and the movement was regarded as cross-border conversion by the Hungarian courts, the situation would have been completely different.[123] According to the Hungarian Act on Business Associations of 2006 a transforming new company cannot operate as company in formation, since the predecessor company should still be in existence.[124] This would have meant in this case that, technically, neither the predecessor Italian company, nor the new Hungarian company existed due to the lack of coordination between the provisions of the two legal systems. In such a situation it is uncertain how the principles of equivalence and effectiveness should be applied to mitigate or remove the pitfalls due to the lack of coordination.

The fourth issue relates to the connecting factors. The Court stresses that the host Member State may determine the connecting factor for the company under incorporation.[125] Thus, the host Member State may enforce a real seat requirement if they apply the real seat theory. It is less clear whether the Member State of origin can enforce a real seat requirement to the extent that they deny deleting the company from their register as long as the company continues to have its real seat in the Member State. If this was possible, a Member State may apply the real seat theory to hinder that companies in that state can convert into, for instance, a UK company without moving their real seat to the UK. However, it must be assumed that the Member State of origin cannot apply the real seat theory in this way. Since the company is in the process of changing applicable law, it must be for the host Member State to decide on the connecting

[121] VALE, supra note 6, paras 9-11.
[122] ibid., para 37.
[123] Peter Kindler, 'Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH', Europäische Zeitschrift für Wirtschaftsrecht, 2012, p. 890.
[124] 2006. évi IV. törvény a gazdasági társaságokról (Act on Business Associations of 2006), 69.§ (4).
[125] VALE, supra note 6, para 29.

factor required for the future.[126] This is supported by the fact that the Court only stresses that the host Member State has this right in the *VALE* case.

5. Cross-Border Conversions – Latest Developments in Corporate Mobility

Cross-border conversion is defined as a cross-border transaction by which the company converts itself into a legal form governed by the law of the host state. By the aforementioned transaction we presume that a company does not alter its identity, but merely modifies its legal form recognized by the home state into a legal form recognized by the host state, thus maintaining the legal relations it has acquired during its previous existence in the home state. Simultaneously, it breaks its connecting factor with the home state and establishes a connecting factor with the host state (state of destination). The important economic benefit of the cross-border conversion resides in its cost efficiency. According to many authors, cross-border conversion enables companies to continue their existence without the need to dissolute or liquidate the company in the home state, nor does it entail a necessity to form a new entity in the host state. Regarding this, any other alternatives to cross-border conversion, resulting in the same effect would encompass more than one transaction, incurring higher costs on the owners of the company. Morsdorf states that at present there are two practiced methods for a company to change its 'corporate clothes' within the EU. Firstly creating a Societas Europea (European Company) involves also a possibility to transfer its registered office from one Member State to another, effectively changing the legal regime applied to SE statute. Another method available to companies is the foundation of a subsidiary in the host Member State, followed by a down-stream vertical merger. However, both options involve at least two separate transactions, which raises the question whether the same result could not be achieved by a cheaper and less cumbersome method which would require only one procedural step. Notably, the cross-border conversions could serve its purpose mainly for small and medium

[126] Karsten Engsig Sørensen & Mette Neville, 'The Internationalisation of Companies and Company Laws', The Columbia Journal of European Law, 2000 p. 197.

sized companies, for which the costly and time-consuming cross-border mergers are unattainable.

5.1 Legal Framework of Cross-Border Conversions

The extension of the corporate mobility concept by the introduction of cross-border conversions has been contemplated by several authors during the last decade; despite this, there is currently no secondary EU legislation that would establish legal grounds for this particular type of the cross-border transaction. The legal basis for cross-border conversion has to be sought in primary legal sources. Two decisions dealing with this subject matter occurred only recently, indicating the future path that CJEU plans to adopt with regard to the development of the corporate mobility concept.

The Cartesio case has been the first decision, in which CJEU declared the companies' right to emigrate with an aim to convert itself into a legal form recognized by the host state. The Court further stated that the home state of the company must not require the company to be dissolved as a consequence of the cross-border conversion. The most important implication of the given decision indicates that although a company is still perceived as a creature of national law, the factual end of a company's life as a direct result of an attempt for cross-border mobility is no longer exclusively in the hands of the home Member State.[127] Notwithstanding this conceptual breakthrough, Cartesio has only insufficiently resolved the issue by stating the duty of the home Member State to allow a cross-border conversion for its domestic companies. The *VALE* decision, in that sense, logically mirrored the doctrine set forth in Cartesio, as it declared the same duty on the side of the host Member State, supposing that the conversion as a type of transaction is available to domestic companies (drawing upon the principle of equality as postulated in the *SEVIC* case). Regarding this, the Court upheld its previous decision that the connecting factor between a certain Member State and a particular company is to be determined individually by each Member State.

[127] Advocate General Poiares Maduro in Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9614, para 31.

In contemplating the corporate mobility option that was made available by the two aforementioned decisions, Morsdorf discussed whether the cross-border conversion captured by the freedom of establishment includes only (i) cross-border conversion accompanied by the transfer of real seat and therefore transfer of business activities into host state, or also (ii) isolated cross-border conversion for the sole purpose of change in the applicable law. Recalling the dichotomy of incentives for corporate mobility explained in Chapter 2.2, the former type of cross-border conversion could be classified as business mobility, whereas the latter type is recognized as legal mobility.

In order to invoke freedom of establishment within the meaning of Article 52 et seq. TFEU, according to judicature,[128] a company has to pursue an economic activity through a fixed establishment in the host Member State. Although some authors contend that such a requirement cannot be justified by any provision in the TFEU itself, such an interpretation has come to constitute an established rule based on the argumentation of the Court. In view of that, the first type of cross-border conversions is perfectly in line with aforementioned requirement as the change of legal form and applicable law only serves to facilitate the physical establishment.

Regarding the second type of cross-border conversion, the situation is rather ambiguous. Morsdorf claims that the lack of business connection with the host Member State prevents isolated cross-border conversion from being subsumed under the freedom of establishment. The exact same position is held by several German authors, namely Behrens, Kieninger and Zimmer.[129] On the contrary, Szydlo and Freitag contend that isolated cross-border conversions comply with the requirements for invoking the freedom of establishment.[130] Particularly Szydlo underlines the cases of Centros and Inspire Art, in which the companies

[128] Case C-221/89, The Queen v. Secretary of State for Transport, Ex Parte Factortame Limited and Others [1991] ECR I-3905, para 20.
[129] Respectively, Peter Behrens, 'Das Internationale Geselschaftrechts nach dem Centros-Urteil des EuGH', Praxis des InternationalesPrivat- und Verfahrungsrecht (IPRAX), 1999, p. 330; Eva-Maria Kieninger, 'Wettbewerb der Privatrechtsordnungen im Europaishe Binnenmarkt', Mohr Siebeck, 2002, p. 159; Daniel Zimmer, 'Grenzuberschreitende Rechtspersonlichkeit', Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, Vol. 168, No. 3, 2004, p. 367.
[130] Marek Szydlo, supra note 18, p. 423 et seq.; Robert Freitag, 'Der Wetbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht', Europäische Zeitschrift für Wirtschaftsrecht 1999, p. 269.

that were formally established under the law of one Member State and conducted business exclusively in another Member State, were granted full freedom of establishment. These supporting voices apparently include the European Parliament, which recently expressed its view that it would constitute an infringement of freedom of establishment if a secondary measure enabling cross-border conversion of EU companies contained a rule requiring a company to move its registered office and real seat to the host state.[131] Although the EP made this comment in a view of potential secondary legislation in that matter which is yet to be enacted, it clearly indicates its attitude towards the aforementioned issue. Reluctance of certain authors to embrace legal mobility in the case of cross-border conversions is rather disturbing. The concept of legal mobility is fully-fledged in the US and indeed unequivocally contributes to sustainable economic benefits derived from a benevolent corporate mobility doctrine.

Evidently, both rulings have not provided a clear answer to even the basic question about the nature of the cross-border conversion they intended to capture under the freedom of establishment. Moreover, the decisions do not entail important issues of conflict of law rules and stakeholders' protection that ought to be applied in these transactions. In view of this, the legal framework of cross-border conversions appears to be devoid of fundamental pillars that would enable practical utilizations of aforementioned development of corporate mobility doctrine.

5.2 The Adaptation of National Legislation to Changes in the Doctrine

This chapter describes how national lawmakers responded to the challenge posed by European company law that was triggered by the *Centros* and *Inspire Art* case law.

In France and Spain, new, deregulated forms of limited liability companies were introduced soon after *Inspire Art* (2003). Since 2003, it has been possible in France to found the *Société à Responsabilité Limitée* (SARL) within twenty-four hours and with a nominal minimum

[131] Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

capital of EUR 1 (previously, the minimum capital for the SARL had been EUR 7,500).[132] The formalities of incorporation were reduced to a minimum – even applications for registration via the internet became possible. Founders can also seek the assistance of a *Centre de Formalités des Entreprises*. The French reform legislation included further facilitative measures in other areas: the newly-founded companies enjoy certain tax and social contribution reductions within the first years of their existence and may use the private address of the founder as the corporate seat even where this would otherwise be contrary to rental contracts or general city planning legislation. In sum, the main purpose of this new legislation is to encourage small start-up enterprises that have their real seat and their main field of activity in France, to choose the French legal form.[133] Largely similar legislation has existed in Spain since April 2003[134] with the adoption of the *Sociedad Limitada Nueva Empresa* (SLNE) as a special form of the traditional *Sociedad de Responsabilidad Limitada* (SL or SRL).[135] In contrast to French law, the SLNE must have a minimum nominal capital of EUR 3,012. Like the new French SARL, the *nueva empresa* is designed to encourage and support small and medium sized start-up enterprises located in Spain.[136] One special feature is a quick set-up procedure: according to Article 134 of the amended version of the *Ley de Sociedades de Responsabilidad Limitada*, the SLNE can be founded within forty-eight hours. Arguably, these two 'early' reforms have already significantly reduced the business exits in these two countries, as compared to other EU countries.[137] In the meantime, France has already adopted a second reform. After the 2003 reform concerning the SARL, the *Société par Actions Simplifiée* (SAS) was reformed in 2008.[138] The SAS is a legal form between the SARL and the *Société Anonyme* (SA), the latter being the French public limited company.

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132 Robert R. Drury, 'The 'Delaware Syndrome': European Fears and Reactions', 2005, Journal of Business Law, p. 717.
133 ibid., p. 719.
134 Ley 7/2003 of 1 April 2003, de la Sociedad Limitada Nueva Empresa por la que se modifica la Ley 2/1995, de 23 de marzo, de Sociedades de Responsabilidad Limitada, BOE núm 79, de 2 de abril, Sec 1, 12679.
135 José Miguel Embid Irujo, 'Eine spanische „Erfindung" im Gesellschaftsrecht: Die „Sociedad limitada nueva empresa'—die neue unternehmerische GmbH', 2004, Recht der Internationalen Wirtschaft, s. 760.
136 ibid., s. 763.
137 Marco Becht et al., supra note 20, p. 252.
138 Loi no 2008-776 du 4 août 2008 de modernisation de l'économie, Journal officiel de la République française no 0181, 12471.

Amongst the various amendments to the SAS, the most remarkable element of the reform was without doubt the waiving of the previous minimum capital requirement of EUR 37,000. One of the explicit goals was again the desire to make the French company legal form more attractive and competitive.[139]

Other countries have followed suit. In the Netherlands, a fundamental review of the private limited (BV) law has been conducted over the last years. The legislation was debated for several years and came into force on 1 October 2012.[140] The reform provided for more freedom for entrepreneurs in that businesses will have more options in their articles of association to depart from the default provisions of law on matters such as voting rights, board member appointment and shareholder resolutions. Most importantly, in most cases the earlier minimum capital of EUR 18,000 for BVs is no longer required. Furthermore, the set-up speed for businesses, which was in urgent need of reform, as this was an important ground for Dutch entrepreneurs to seek incorporation abroad, is set to be improved.[141]

Similarly, Germany has adopted a major company law reform.[142] At first, it was uncertain whether the country would take the Spanish route of adopting a new legal form alongside the existing ones,[143] or rather follow the French/Dutch example of reforming the existing legal forms. Finally, a compromise was found: the existing *Gesellschaft mit beschränkter Haftung* (GmbH, private limited liability company) was reformed and at the same time, a variant of the GmbH was introduced. Whereas the existing GmbH still requires the minimum capital of EUR 25,000, the new younger brother of the GmbH, the *Unternehmergesellschaft* ('UG'—start-up company), is integrated into the existing GmbH statute and can be set up without

[139] Renaud Mortier, 'La modernisation du droit des sociétés' (2008) La Semaine Juridique Entreprise et Affaires 2233; Jean-François Barbièri, 'La SAS revisitée par la LME', 2008, Bulletin Joly Sociétés, p. 560; Thibaut Massart, 'La modernisation de la SAS ou comment apporter moins pour gagner plus', 2008, Bulletin Joly Sociétés, p. 632-633.
[140] Wet vereenvoudiging en flexibilisering Nederlands bv-recht ('Wet Flex BV').
[141] Robert R. Drury, supra note 132, p. 740.
[142] Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) of 23 October 2008, Bundesgesetzblatt I 2026.
[143] Wulf Goette, 'Einführung in das neue GmbH-Recht', Munich, CH Beck, 2008.

minimum capital.[144] However, the new code imposes some restrictions: the UG is not allowed to fully distribute its profits until its level of capital has reached the threshold of the regular GmbH (EUR 25,000).[145] One principal concern of the German reform is to facilitate and accelerate the establishment of a business. Thus, for instance, model articles of association are made available for standard set-ups, without having to consult a public notary. Furthermore, the set-up process is accelerated.

It is interesting to notice, that not only continental Europe is responding to international developments – the United Kingdom also attempts to further modernize its company law. One of the explicit ambitions of the Companies Act of 2006 was to make the UK 'even more competitive in an ever more globalised and interlinked environment'.[146] To be sure, it has not been the objective of the UK lawmakers to actively 'export' their company law to the rest of Europe. Rather, the goal of the 2006 reform was to 'maintains the UK's position as one of the most attractive places in the world to set up and run a business' and 'to promote growth, competitiveness and jobs.'[147] Moreover, the company law reform in the UK started well before the CJEU handed down its judgment in *Centros*.

Not all countries have embraced this general tendency, however. One of the counter-examples is Austria, where no comparable reform has been implemented and the minimum capital requirement remains unchanged at EUR 35,000. There were discussions over the past years to follow the general trend,[148] but no reform step has yet been taken. One of the main reasons for the government's reluctance in recent years seems to have been the potential loss of tax

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144 Heribert Hirte, 'Die „Große GmbH-Reform"—Ein Überblick über das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)' [2008] Neue Zeitschrift für Gesellschaftsrecht 761

145 Christoph Teichmann, 'Modernizing the GmbH: Germany's move in Regulatory Competition' (2010) 7 European Company Law 20.

146 Department of Trade and Industry, Company Law Reform—White Paper (London, The Stationery Office 2005, Cm 6456) 9.

147 Company Law Review Steering Group, Modern Company Law for a Competitive Economy (2006) at 5.1; Company Law Review Steering Group, Modern Company Law for a Competitive Economy – The Strategic Framework (2006) ch 2.

148 Thomas Bachner (ed), 'GmbH-Reform – Erleichterte Gründung, Gläubigerschutz, Insolvenzprophylaxe' (Vienna, 2008).

revenue, since the minimum corporation tax depends on the company's share capital.[149] More recently, the government has reinvigorated its attempts to reform Austrian company law, with a plan to reduce minimum capital to EUR 10,000.[150]

5.3 The Need for Harmonized Regulation

The *Cartesio* and *VALE* decisions and their implications very clearly lead to the conclusion that a combined legislative effort at EU level is indispensable for further development of companies' freedom of establishment.[151] Neither legal certainty, nor efficiency can be achieved merely by the 'direct effect' of primary law, which, even though it prevents application of restrictive national rules in individual cases, does not provide a comprehensive set of rules that would be applied alternatively to the often restrictive national rules.[152] We must also bear in mind the costs involved with running a foreign company and complying with disclosure obligations in individual Member States that are strictly enforced. The transitioning companies also encounter high acceptance and reputation costs at home. All of these problems in their combination can be framed in terms of diffusion theory, highlighting the sociological aspects of subscribing to innovations or new organizational concepts.[153] Needless to say, the legal certainty is, in this particular case of cross-border conversions that involve high costs and encumbrances, of utmost importance. As the authors are divided in their opinion, whether the second type of cross-border conversions can be derived directly from freedom of establishment, they also disunite in the view, whether the harmonized directive should encompass both types of such transactions. Morsdorf claims that as the latter type of cross-border conversions does not fall under the freedom of establishment, a need for

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[149] Gerwin Kürzel, 'GmbH-Reform in Österreich – Warten auf Godot?' 9 August 2012, http://fiduzia.blogspot.co.uk/2012/08/gmbh-reform-in-osterreich-warten-auf.html

[150] Ergebnisse der Regierungsklausur in Laxenburg, 9 November 2012, p 4, https://www.bka.gv.at/DocView.axd?cobId=49364

[151] Authors are almost unanimous on the opinion that Directive on EU level is necessary. See for instance, Marek Szydlo, supra note 18, p.441 et seq., Gert-Jan Vossestein, 'Transfer of the Registered Office. The European Commission's Decision Not to Submit a Proposal for a Directive, Utrecht Law Review, Volume 4, Issue 1, 2008, p. 123, Oliver Morsdorf, supra note 13, p. 658 et seq., Eddy Wymeersch, supra note 8, p. 169.

[152] Oliver Morsdorf, supra note 13, p. 659; See also Gert-Jan Vossestein, supra note 151, pp. 53-65, p. 62 et seq.; Eva-Maria Kieninger, supra note 129, p. 618.

[153] Wolf-Georg Ringe, supra note 10, p. 30.

secondary legislation cannot be simply grounded on a need to facilitate freedom of establishment, but it would have to stand on its own. On contrary, Szydlo states that judicature of the CJEU has already approved the concept of legal mobility and hence the EU legislator should embrace such a concept also by providing matching secondary legislation. Indeed, the legal mobility as a concept was embraced in the 10th Directive, hence there would be no particular justification for refusing an analogical development in the case of cross-border conversions.

In fact, the Commission has already twice announced an initiative to propose a directive on cross-border transfer of registered office (enabling both types of cross-border conversions), in 1997 and subsequently in 2004, nevertheless both initiatives were eventually abandoned.[154] Particularly the decision to abandon the second initiative in 2007 bewildered many experts and observes, as it would effectively pave a way for isolated cross-border conversions. Regarding this, Charlie McCreevy, Commissioner for the Internal Market, released a public statement, in which he questioned the economic added value of the directive and contemplated that current alternatives for cross-border conversion and existing case law already provides sufficient framework for the transactions leading to the same outcome.[155] Many authors, however, oppose this statement, as the current legal framework cannot prevent Member States from applying divergent conflict of law rules and national substantive rules in order to invoke restrictions on freedom of establishment justified by the overriding general interest. Vossestein even suggests that the abandonment of the latter initiative might have been a political move that was incentivized by the future introduction of Societas Privatea Europea (European Private Company) that would be enabled to conduct cross-border conversion and therefore be equipped with the attribute that national companies were deprived of.

Although many authors unite under the view that a harmonized regulation is needed, fewer of them discussed the actual content of the directive. Concerning the content, Morsdorf

[154] First initiative was summarized in Document No XV/D2/6002/97, second initiative was demonstrated by the Consultation document containing basic theses on the proposal of 14th Directive on the Cross-Border Transfer of Registered Offices.
[155] Speech/07/441 of 28th June 2007 (Commissioner McCreevy on the 14th Directive), supra note 26.

contended that a future directive shall contain (i) conflict of law rules, which would unequivocally reject the real seat theory (ii) substantive provisions that would prescribe the procedure of decision-making with regard to cross-border conversions and (iii) measures to safeguard interests of stakeholders (minority shareholders, creditors and employees).

With regard to the first point, the application of the real seat theory in the host state would indeed disable the isolated cross-border conversions. However, the mere shift to incorporation theory would not resolve the issue as the manner in which Member States apply the incorporation theory differ significantly. For the resolution of this impasse, Wisniewski and Opalski suggest the introduction of a new registration theory, using the place (Member State) of registration as the connecting factor for determining the nationality of the company.[156] Indeed this could serve as an inspiration to the European legislator, providing that the works on the 14th Directive will be eventually revived following the January-April 2013 Consultations initiated by the Commission on the matter.[157]

Concerning the second and third group of provisions, Morsdorf suggests to follow *mutatis mutandis* the set of rules stipulated by 3rd Directive on Domestic Mergers and the 10th Directive on Cross-Border Mergers. However the provided solution, particularly the measures regulating stakeholders' protection in the aforementioned directives, has also received a significant portion of negative comments from experts. For instance, Raaijmakers and Olthoff criticized the concept of creditors' protection which was to a large extent left to be defined and implemented by the national legislation of Member States. Wyckaert and Geens, similarly commented on minority shareholders' protection that is not obligatorily required by the 10th Directive.[158] Apparently, the issues that were identified in Directive on cross-border mergers are re-occurring also in the case of cross-border conversions and hence could serve as a further pressure on the European legislator to act in favor of their resolution through the adoption of the 14th Directive.

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[156] Andrzej Wisniewski, supra note 63, pp. 595-625 p. 625.
[157] Consultation on the cross-border transfers of registered offices of companies (January-April 2013), see http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm.
[158] Marieke Wyckaert and Koen Geens, 'Cross-border Mergers and Minority Protection: An Open-ended Harmonization', Utrecht Law Review, Volume 4, Issue 1, 2008, pp. 40-52.

Conclusion

The two recent decisions of CJEU on corporate mobility (*VALE* and *Cartesio*) have paved the way for a new type of cross-border transaction that would enable companies to effectively change their applicable law by transferring its registered seat to another Member State. Such a development in the doctrine provided for an extension of the rights subsumed under the freedom of establishment as stipulated in article 49 TFEU. The examination of available literature has revealed a cluster of legal issues that directly pertain to re-incorporation mobility and inherently to cross-border conversions. Within the next paragraphs, I would like to assess the findings that have arisen from the research of scholarly literature on the subject and provide a comprehensive evaluation of the present state of the matter in the field of corporate mobility with an emphasis on the unresolved and recurrently problematic issues.

Without dispute, the majority of authors recognized the significant, albeit broadly predicted, impact of the *VALE* decision in elucidating that the right to cross-border conversions is protected by the freedom of establishment, and should therefore be allowed to the extent that such conversions are permitted under the national law of the host Member State and facilitated by both Member States involved. The Court has confirmed that, in addition to the ability to choose the governing law of a new company and to change that law through a cross-border merger, companies are now able to change their governing law in a single step. This development is generally commended as rendering the case law more consistent in some respects,[159] although some authors point out the discrepancies in the Court's doctrine.[160]

It is certain that this judgment will require most Member States to amend their legal systems and practices. Member States realize that cross-border conversions require a better protection of creditors, minority shareholders and employees, and therefore see a need to adopt special rules on cross-border reorganizations. This determines the need of the Member States to coordinate the creation of an efficient system enabling cross-border conversions, not only from a company law perspective, but also from a tax law perspective. Even though Member

[159] Dániel Gergely Szabó, supra note 71, p. 17.
[160] Justin Borg-Barthet, supra note 3, p. 7.

States involved must work bona fide to overcome this lack of coordination it must be expected that in practice it may prove to be very difficult to carry cross-border conversions and other restructuring, since precise guidelines for solving conflicts are lacking. This remains the biggest problem and if we also consider the many ambiguities left by the *VALE* case, it is difficult to understand why the Commission in its latest Action Plan is still not ready to fully commit itself to restart the work on the on the 14th Company Law Directive.[161]

Moreover, there remain a number of *conceptual* difficulties. In particular, Member States have failed to reach a common understanding of the aims of corporate law and the treatment of the cross-border mobility of companies. As a consequence, the market for cross-border mobility is still a rather obscure area given that the laws of the Union do not provide a clear framework for the transnational regulation of companies. This situation has eventually resulted in excessive reliance on the CJEU over the years. Unfortunately, the Court is unable to create the legal and administrative framework to support the economic freedoms which its judgments confer. Its case law furthermore fails to engage with the Member States' policy concerns in a principled fashion – this explains the abnormal limitation of party autonomy which is of little benefit to corporate stakeholders and the development of freedoms without due regard to the need for a legislative framework. The Court's reluctance to clarify remaining contradictions in the case law confirms that negative harmonization remains a blunt instrument for the regulation of corporate law and further strengthens the argument for a comprehensive and systematic legislation that would effectively resolve remaining questions.

To sum up, the current legal framework for cross-border conversions, based solely on primary law sources appears to be insufficient for the practical performance of the given transactions. Although the CJEU case law on corporate mobility issues has been influential and efficient in setting the cornerstones of a tangible doctrine, it may not compensate for a set of concrete and generally-binding normative rules, a fact stemming from the very nature of the Court's role and its constitutional function. Thus, as expected, the academic debate, as presented,

[161] Christoph Teichmann, supra note 107, p. 2092, and Jesper Lau Hansen, 'The Vale Decision and the Court's case law on the nationality of companies', European Company and Financial Law Review, Volume 10, Issue 1, 2013, p. 12.

unequivocally confirmed the urgent need for further legislative activity on the European level. The extent for such harmonization and its explicit contents, however, especially related to the identified legal drawbacks, has not been contemplated by the given authors. The summarized findings of the thesis provide a solid and scholarly founded basis for the comprehensive analysis of legal issues related to corporate mobility and the possible remedies that could be soon embodied in the secondary legislation on European level.

Bibliography

Books, Articles and Electronic Sources

John Armour, 'Who Should Make Corporate Law? EC Legislation Versus Regulatory Competition', Current Legal Problems, Volume 58, 2005.

John Armour and Wolf-Georg Ringe, 'European Corporate Law 1999-2010: Renaissance and Crisis', Common Market Law Review, Volume 48, Issue 1 2011.

Thomas Bachner (ed), 'GmbH-Reform – Erleichterte Gründung, Gläubigerschutz, Insolvenzprophylaxe', Vienna, 2008.

Tito Ballarino, 'From Centros to Überseering: EC Right of Establishment and the Conflict of Laws', Yearbook of Private International Law, 2002.

Tito Ballarino, 'Sulla mobilità delle società nella Comunità Europea. Da Daily Mail a Überseering: norme imperative, norme di conflitto e libertà comunitarie', Rivista delle società, 2003.

Jean-François Barbièri, 'La SAS revisitée par la LME'Thibaut Massart, 'La modernisation de la SAS ou comment apporter moins pour gagner plus', Bulletin Joly Sociétés, 2008.

Marco Becht, Colin Mayer, and Hannes F. Wagner, 'Where Do Firms Incorporate? Deregulation and the Cost of Entry', August 2007, ECGI - Law Working Paper No. 70/2006; Journal of Corporate Finance, Volume 14, No. 3, 2008.

Peter Behrens, 'Das Internationale Geselschaftrechts nach dem Centros-Urteil des EuGH', Praxis des InternationalesPrivat- und Verfahrungsrecht (IPRAX), 1999.

Gian Antonio Benacchio and Lesley Orme (trans), 'The Harmonization of Civil and Commercial Law in Europe', Central European University Press, 2005.

Hanne S. Birkmose, 'A market for company incorporations in the European Union? Is Uberseering the beginning of the end?', Tulane Journal of International and Comparative Law, Volume 13, 2005.

Justin Borg-Barthet, 'Free at last? Choice of corporate law in the EU following the judgment in Vale', International & Comparative Law Quarterly, I.C.L.Q. 2013, Volume 62(2), Cambridge University Press, 2013.

Justin Borg-Barthet, 'The Governing Law of Companies in EU Law', Hart Publishing, Oxford, 2012.

William W. Bratton, Joseph A. McCahery, and Erik P. M. Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis', ECGI - Law Working Paper No. 91/2008; Georgetown Law and Economics Research Paper No. 1086667; Amsterdam Center for Law & Economics Working Paper No. 2008-01, January 2008.

Janeen Carruthers et al., 'Company Law in Europe – Condoning the Continental Drift?', European Business Law Review, 2000.

Alan Dashwood et al., 'Wyatt and Dashwood's European Union Law', Hart Publishing, Oxford , 6th ed., 2011.

Robert R. Drury, 'The Regulation and Recognition of Foreign Corporations: Responses to the Delaware Syndrome', The Cambridge Law Journal, Volume 57, Issue 01, March 1998.

Robert R. Drury, 'The 'Delaware Syndrome': European Fears and Reactions', Journal of Business Law, 2005.

Werner F. Ebke, 'Centros – Some Realities and Some Mysteries', American Journal of Comparative Law, Volume 48, 2000.

Werner F. Ebke, 'Real Seat Doctrine in the Conflict of Corporate Laws', International Law, Volume 36/1015, 2002.

Werner F. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond', European Business Law Review, Volume 16, issue 1, 2005.

José Miguel Embid Irujo, ‘Eine spanische „Erfindung“ im Gesellschaftsrecht: Die „Sociedad limitada nueva empresa’—die neue unternehmerische GmbH’, Recht der Internationalen Wirtschaft, 2004.

Robert Freitag, ‘Der Wetbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht’, Europäische Zeitschrift für Wirtschaftsrecht, 1999.

Manuel Garcia-Reistra, ‘The Transfer of Seat of the European Company v Free Establishment Case-Law’,European Business Law Review, 2004.

Carsten Gerner-Beuerle, ‘Right of establishment and corporate mobility: The decision of the court of justice in VALE’, 2013.

Carsten Gerner-Beuerle and Michael Schillig, ‘The Mysteries of Freedom of Establishment after Cartesio’, International & Comparative Law Quarterly, Volume 59, 2010.

Bernhard Großfeld, ‘Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Internationales Gesellschaftsrecht’, de Gruyter, 1998.

Wulf Goette, ‘Einführung in das neue GmbH-Recht‘, Munich, CH Beck, 2008.

Jesper L. Hansen, ‘The Vale Decision and the Court's Case Law on the Nationality of Companies’, October 29, 2012, European Company and Financial Law Review, Volume 1, 2013; Nordic & European Company Law Working Paper No. 10-32.

Heribert Hirte, ‘Die „Große GmbH-Reform“—Ein Überblick über das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)‘, Neue Zeitschrift für Gesellschaftsrecht, 2008.

Erik Jayme, ‘Substitution and principle of equivalence in Private International Law’, Annuaire de l'Institut de droit international, Volume 78, 2007.

Eva-Maria Kieninger, ‘Wettbewerb der Privatrechtsordnungen im Europaishe Binnenmarkt’, Mohr Siebeck, 2002.

Peter Kindler, 'Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH', Europäische Zeitschrift für Wirtschaftsrecht, 2012.

Veronika Korom and Peter Metzinger, 'Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06 ', European Company and Financial Law Review, Volume 6, Issue 1, 2009.

Gerwin Kürzel, 'GmbH-Reform in Österreich – Warten auf Godot?' 9 August 2012, http://fiduzia.blogspot.co.uk/2012/08/gmbh-reform-in-osterreich-warten-auf.html

Pierre Larouche, 'Legal Emulation between Regulatory Competition and Comparative Law', April 23, 2012, TILEC Discussion Paper No. 2012-017.

Stefano Lombardo, 'Regulatory Competition in the Company Law in the European Union after Cartesio', European Business Organization Law Review, Volume 10(04), 2009.

Oliver Morsdorf, 'The Legal Mobility of Companies within the European Union through Cross-border Conversions', Common Market Law Review, Volume 49, 2012.

Renaud Mortier, 'La modernisation du droit des sociétés', La Semaine Juridique Entreprise et Affaires 2233, 2008.

Federico M. Mucciarelli, 'Company Emigration and EC Freedom of Establishment: Daily Mail Revisited', European Business Organization Law Review, Volume 9, 2008.

Francesco Munari and Paolo Terrile, 'The Centros Case and the Rise of an EC Market for Corporate Law' in Guido Ferrarini, Klaus J. Hopt and Eddy Wymeersch (eds), Capital Markets in the Age of the Euro: Cross-Border Transactions, Listed Companies and Regulation, The Hague, Kluwer Law International 2002.

Paschalis Paschalidis, 'Freedom of Establishment and Private International Law for Corporations', Oxford Private International Law Series, 2012.

John Paterson, 'The Company Law Review in the UK and the Question of Scope: Theoretical Concerns, Practical Constraints and Possible New Directions' in Robert Cobbaut and Jasques

Lenoble (eds), Corporate Governance. An Institutional Approach, Kluwer Law International, 2003.

Geert T.M.J. Raaijmakers and Thijs P.H. Olthoff, 'Creditor Protection in Cross-border Mergers: An Unfinished Business', Utrecht Law Review, Volume 4, Issue 1, 2008.

Stephan Rammeloo, 'Corporations in Private International Law: A European Perspective', Oxford University Press, 2001.

Stephan Rammeloo, 'The 14th Company Law Directive on the Cross-Border transfer of the Registered Office of Limited Liability Companies – Now or Never?', Maastricht Journal of European and Company Law, Volume 15, 2008.

Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition', University of Oxford Legal Research Paper Series, Paper No 34/2013, June 2013.

Wolf-Georg Ringe, 'No Freedom of Emigration for Companies?', European Business Law Review, Volume 16, 2005.

Wolf-Georg Ringe, 'Sparking Regulatory Competition in European Company Law: The Impact of the Centros Line of Case Law and its Concept of 'Abuse of Law'' in R de la Feria and Stefan Vogenauer (eds), 'Prohibition of Abuse of Law: A New Principle of EU Law?', Hart Publishing, Oxford, 2011.

Wulf-Henning Roth, 'Case Note on Centros', Common Market Law Review, Volume 37, 2000.

Wulf-Henning Roth, 'From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law', International and Comparative Law Quarterly, Volume 52, 2003.

Alberto Santa Maria, 'European Economic Law', Kluwer, 2009.

Clive M. Schmitthoff, 'Company Structure and Employee Participation in the EEC-the British Attitude', International & Comparative Law Quarterly, 1976.

Mathias Siems, 'SEVIC: Beyond Cross-Border Mergers', European Business Organization Law Review, Volume 8, 2007.

Dániel Gergely Szabó and Karsten Engsig Sørensen, 'Cross-border conversion of companies in the EU: the impact of the VALE judgement', LSN Research Paper Series, No. 10-33, 2013.

Marek Szydlo, 'The Right of Companies to Cross-border Conversion under the TFEU Rules on Freedom of Establishment' European Company and Financial Law Review. Volume 7, Issue 3, 2010.

Christoph Teichmann, 'Der Grenzüberschreitende Formwechsel ist spruchreif: das Urteil der EuGH in der RS. Vale', Der Betrieb, 2012.

Christoph Teichmann, 'Modernizing the GmbH: Germany's move in Regulatory Competition', European Company Law, Volume 20, 2010.

Takis Tridimas, 'The General Principles of EU Law', Second Edition, 2006.

Erik P.M. Vermeulen and Joseph A. McCahery, 'Understanding Corporate Mobility: Towards the Foundation of European Internal Affairs Doctrine', Working Paper Prepared for the 5th European Company Law and Corporate, Governance Conference in Berlin on 27-28 June, 2007.

Gert-Jan Vossestein, 'Transfer of the Registered Office. The European Commission's Decision Not to Submit a Proposal for a Directive, Utrecht Law Review, Volume 4, Issue 1, 2008.

Erik Werlauff, 'Using a Foreign Company for Domestic Activities', European Business Law Review, Volume 10, 1999.

Oliver E. Williamson, 'The Theory of the Firm as Governance Structure: From Choice to Contract', Journal of Economic Perspectives, 2002.

Andrzej W. Wiśniewski and Adam Opalski, ‘Companies' Freedom of Establishment after the ECJ Cartesio Judgment’, European Business Organization Law Review (EBOR), Volume 10, Issue 4, 2009.

Marieke Wyckaert and Koen Geens, ‘Cross-border Mergers and Minority Protection: An Open-ended Harmonization’, Utrecht Law Review, Volume 4, Issue 1, 2008.

Eddy Wymeersch, ‘Centros: A Landmark Decision in European Company Law’ in Theodor Baums, Klaus J. Hopt and Norbert Horn (eds), ‘Corporations, Capital Markets and Business in the Law: Liber amicorum Richard M. Buxbaum’, Deventer, Kluwer, 2000.

Eddy Wymeersch, ‘Is a Directive on Corporate Mobility Needed?’, European Business Organzation Law Review, Volume 8, 2007.

Helen Xanthaki, ‘Centros: Is This Really the End for the Theory of the Siege Reel?’, Company Lawyer, Volume 22, 2001.

Daniel Zimmer, ‘Grenzuberschreitende Rechtspersonlichkeit’, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, Volume 168, No. 3, 2004.

Case law of the Court of Justice of the European Union

Case 81/87 The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECR 5483.

Case C-221/89, The Queen v. Secretary of State for Transport, Ex Parte Factortame Limited and Others [1991] ECR I-3905.

Case C- 212/97, Centros Ltd v Erhvervs- og Selskabsstyrelsen, [1999] ECR I-1459.

Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR I-9943.

Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003] ECR I-0155.

Case C-411/03 SEVIC Systems [2005] ECR I-10825.

Case C-196/04 Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue [2006] ECR I-7995.

Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9614.

Case C-371/10 National Grid Indus [2011] ECR I-0000.

Case C-378/10 VALE Építési kft. [2012] ECR 00000.

Advocate General Giuseppe Tesauro in Case C-214/89 Powell Duffryn plc v Petereit [1992] ECR I-01745.

Advocate General Antonio Mario La Pergola in Case C-212/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] ECR I-01459.

Advocate General Poiares Maduro in Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9614.

Advocate General Niilo Jääskinen in Case C-378/10 VALE Építési kft. [2012] ECR 00000.

Secondary Legislation and Related Documents

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), [2001] OJ L294/1.

Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State [1989] OJ L395/36.

Directive of the transfer of the seat from one Member State to another (proposal from 1997: Doc No XV/D2/6002/97-EN REV.2).

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1.

European Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)), and report of 9 January 2012.

European Parliament, Committee on Legal Affairs, 'Draft Report with recommendations to the Commission on cross-border transfers of company seats' 2008/2196 (INI) of 17 October 2008.

EC Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968, Bulletin of the European Communities, Supplement 2/69.

Consultation on the cross-border transfers of registered offices of companies (January-April 2013), see http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.html.

Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union summary report of July 2006, available online at ec.europa.eu/internal_market/company/consultation/index_en.htm

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies (December 2012), at 4.1.

Speech at the European Parliament's Legal Affairs Committee, Commissioner McCreevy, 3 October 2007, Speech/07/592.

National Legislation

2006. évi IV. törvény a gazdasági társaságokról (Hungarian Act on Business Associations of 2006)

Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) of 23 October 2008, Bundesgesetzblatt I 2026.

Ley 7/2003 of 1 April 2003, de la Sociedad Limitada Nueva Empresa por la que se modifica la Ley 2/1995, de 23 de marzo, de Sociedades de Responsabilidad Limitada, BOE núm 79, de 2 de abril, Sec 1, 12679.

Loi no 2008-776 du 4 août 2008 de modernisation de l'économie, Journal officiel de la République française no 0181, 12471.

Abstract in English

The thesis deals with the latest developments in corporate mobility in the light of the recent CJEU decisions and its inherently formulated doctrine. After a brief introduction of the discussed general concepts, a dissection of previous case law and relevant legislation, the author explores the ways in which the current changes in the conception of cross-border conversions have influenced corporate mobility as a whole and the perception of freedom of establishment in particular. The question whether further legislative actions have to be taken in order to enable companies to take advantage of these developments is debated. The thesis is divided into five logical clusters which are structured in the following manner. Firstly, I analyze the fundamental pillars of corporate mobility, liability and capital protection doctrines that serve as the tangential object of interest to the actual subject matter as they represent the wider legal framework of European company law. Secondly, a comprehensive summary of the preceding case law of the Court on the issue of freedom of establishment is presented, providing an insight on the current issues, which are thoroughly discussed and analyzed in the remainder of the thesis. In Chapter four, the VALE case is further dissected and implications of the case on the corporate mobility doctrine as well as the problematic issues that it left unresolved are reflected upon. In the fifth Chapter, the aforementioned developments are perceived in a broader context by taking into consideration the scholarly interpretation as well as empirical studies that have been conducted to assess the impact of the relevant CJEU decisions on the legislation of the member States and the behavior of companies within the EU. Part of this chapter is a brief description of the changes in the national legislation of France, Spain, the Netherlands, Germany, the United Kingdom, and Austria as a direct reaction to the developments in EU Law regarding corporate mobility. Lastly, the arguments used throughout the analyzed body of literature are summarized in order to evaluate the need and nature of changes that are expected from the European legislator in the near future.

Abstract in Czech

1. Úvod

Oproti všeobecným očekáváním spjatými se sjednocením a liberalizací evropského vnitřního trhu, autonomie vůle při výběru korporátního práva v Evropské unii přicházelo pomalu a nejednotně. Po neúspěšném pokusu o prosazení Úmluvy o vzájemném uznávání společností a právnických osob v roce 1968[162] bylo upuštěno od vytvoření právního rámce založeného na sekundární evropské legislativě v oblasti práva obchodních společností a jejich přeshraniční mobility. V takové situaci Soudní dvůr Evropské unie (dále jen "SDEU" nebo "Soudní dvůr") jednal s atypickou pro něj zdrženlivostí a opatrností ve svém rozsudku Daily Mail, v němž byla britské společnosti odepřena možnost přestěhovat se do Nizozemska.[163] Způsobené právní vakuum umožnilo členským státům zachovat svá vlastní pravidla mezinárodního práva soukromého v oblasti obchodního práva, a to včetně ustanovení omezující autonomii vůle při výběru rozhodného korporátního práva.[164]

Nedávná vysoce sledovaná rozhodnutí SDEU v kauzách VALE[165] a Cartesio[166]znova obrátila pozornost odborné, ale i širší veřejnosti na problematiku podnikové mobility v rámci Evropské unie. Vzhledem k tomu, že předchozí rozhodnutí Soudního dvora týkající se volného pohybu společností často byla kontroverzní a nejednotná z hlediska kontinuity vytvářené doktríny, byla tato nová rozhodnutí očekávána s nadšením. Důležitost výše uvedených rozhodnutí spočívá především v jejich podílu na přípravě cesty pro relativně nový

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[162]EC Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968, Bulletin of the European Communities, Supplement 2/69, pp. 7-18.

[163]Case 81/87 The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECR 5483.

[164]Stephan Rammeloo, 'Corporations in Private International Law: A European Perspective', Oxford University Press, 2001, pp. 36-37; Tito Ballarino, 'From Centros to Überseering: EC Right of Establishment and the Conflict of Laws', Yearbook of Private International Law, 2002, pp. 203-208.

[165] Case C-378/10 VALE Építési kft. [2012] ECR 00000.

[166]Case C-210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I-9614.

typ přeshraniční transakce, kterým je přeshraniční přeměna (*cross-border conversion*).[167] VALE a Cartesio, stejně jako téma firemní mobility obecně, byla hojně komentována v dostupné literatuře, nicméně zaměření autorů se vztahuje zejména na právní interpretaci konkrétních rozhodnutí, přičemž důležité důsledky těchto rozhodnutí pro základy doktríny korporátní mobility jsou často opomíjeny. Daná práce se snaží tyto důsledky analyzovat a předložit pozornosti čtenářů.

Lze tvrdit, že mobilita společností v Evropě dosáhla určité úrovně zralosti a právní rámec upravující danou oblast, spočívající především na judikatuře SDEU, je již etablován a náležitě prozkoumán. Nicméně se zdá, že zcela nespoutaná svoboda usazování bude Soudním dvorem obětována za účelem toho, aby bylo zachráněno zdání konzistence řady jeho dosavadních, často protichůdných rozsudků. Zejména je nepravděpodobné, aby Soudní dvůr rozvinul judikaturu do konečné podoby svých logických závěrů, které by přivodily zrušení aplikace teorie sídla v plném rozsahu, neboť by to bylo v rozporu s dosavadním postojem, opakovaně potvrzeným Soudním dvorem.[168]

Firemní mobilita je fascinující a dynamicky se rozvíjející obor s přímým dopadem na evropskou podnikatelskou sféru, a tudíž i na životní standard evropských občanů. Na tomto místě bych chtěl upozornit na specifický charakter tohoto odvětví, které lze popsat jako směs pravidel, pojmů a mechanismů ze tří samostatných oblastí práva - práva EU, práva obchodních společností a mezinárodního práva soukromého. Vzhledem k omezenému rozsahu práce, komplexní hodnocení, které by zkoumalo tuto otázku ve světle všech tří výše uvedených oborů, by měla nepříznivý dopad na přidanou hodnotu práce a jako následek vyústila v poměrně povrchní popis dosavadního vývoje ve sféře podnikové mobility. Tato logika mě vedla k zaměření se na danou problematiku především z hlediska práva EU. Další omezení rozsahu práce, které bych chtěl objasnit v úvodu práce, se týká jednotlivých celků,

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[167]Eddy Wymeersch, 'Is a Directive on Corporate Mobility Needed?', European Business Organzation Law Review (2007) 8, pp. 161-169.

[168]Justin Borg-Barthet, 'Free at last? Choice of corporate law in the EU following the judgment in Vale', International & Comparative Law Quarterly, I.C.L.Q. 2013, 62(2), © 2013 Cambridge University Press, p. 505.

tvořících obor firemní mobility – práce se zabývá tzv. re-inkorporační mobilitou (změna sídla po založení společnosti) spíše než inkorporační mobilitou (založení nové společnosti v kterémkoliv členském státě) a v rámci re-inkorporační mobility je kladen důraz zejména na přeshraniční přeměny, spíše než na přeshraniční fúze.

Ve vypracování práce jsem se řídil následující výzkumnou otázkou: „Jak nedávná rozhodnutí SDEU týkající se přeshraničních přeměn ovlivnila stávající doktrínu firemní mobility, formulovanou předchozím acquis a zda je nutné přijmout další legislativní opatření s cílem umožnit společnostem využít tohoto vývoje?“

V návaznosti na výzkumnou otázku jsem vyvinul následující hypotézu: „Doktrína firemní mobility, tak jak byla formulována v předchozím acquis, se odklání od svých dosavadních konceptů s ohledem na nový vývoj v oblasti přeshraničních přeměn. Jakožto nositel nového institutu, tento vývoj nemůže být založen pouze na judikatuře Soudního dvora a na primárním právu, neboť tato postrádají právní konkrétnost nezbytnou pro současné a budoucí rozvinutí.

2. Mobilita společností - všeobecný přehled

Význam mobility společností spočívá v ekonomických důsledcích vyplývajících z tohoto jevu. McCahery a Vermeulen ve svém článku „Principy firemní mobility“ shrnují přínos firemní mobility následovně:

„Firemní mobilita přináší významné zlepšení výkonnosti evropských podniků, a tím posiluje důvěru v hospodářský růst v rámci EU. Přispívá tedy k vytvoření nejdynamičtější a nejkonkurenceschopnější ekonomiky založené na informacích, jak je to stanoveno v cílech Lisabonské smlouvy.“[169]

V praxi, na druhé straně, nejsou k dispozici žádné empirické studie, které by jednoznačně potvrdily kauzální výskyt pozitivního účinku na evropskou ekonomiku. Mörsdorf tvrdí, že

[169]Erik P.M. Vermeulen and Joseph A. McCahery, ‘Understanding Corporate Mobility: Towards the Foundation of European Internal Affairs Doctrine’, Working Paper Prepared for the 5th European Company Law and Corporate, Governance Conference in Berlin on 27-28 June, 2007.

judikatura Soudního dvora vedla k vysoké úrovni firemní mobility v rámci EU.[170] Studie však dokazují, že intenzita mobility společností je poměrně nízká a zahrnuje především tzv. start-up firmy s velmi krátkou životností, proto by bylo možné namítnout, že současný vliv podnikové mobility na ekonomiku EU je v podstatě zanedbatelný.[171] Je třeba ale poznamenat, že výsledky empirických studií, nelze vykládat v tom smyslu, že firemní mobilita je neúčinným konceptem, nebo že neexistuje žádná poptávka po takovém instrumentu. Znamená to především to, že oblast mobility společností v současné době stále obsahuje značná omezení a nejasnosti, které způsobují neochotu podnikatelů plně využít svých práv zaručených svobodou usazování. Poptávka po podnikové mobilitě byla mimo jiné potvrzena průzkumem Generálního ředitelství pro vnitřní trh a služby zveřejněného v rámci konzultací a slyšení o budoucích prioritách pro akční plán na modernizaci práva společností a efektivnějšího řízení podniků v Evropské unii. V tomto průzkumu se téměř 80% respondentů domnívalo, že je stále potřeba směrnici regulující přemístění sídla, která by měla významný dopad na praktické záležitosti týkající se přeshraničních přeměn.[172]

3. Současný právní rámec mobility společností

Z praktického hlediska mohou podnikatelé v současné době založit společnost v jakémkoliv členském státě podle své volby („domovský ČS“) a následně provádět obchody s touto společností v jakémkoliv jiném členském státě („hostitelský ČS“). Hostitelský členský stát musí uznat právní osobnost a právní charakteristiku společnosti jako takové – to znamená, že pravidla týkající se vnitřní organizace, ručení, tvorby rezerv, postavení společnosti, odpovědnosti jednatelů, atd. jsou upraveny výhradně právem domovského členského státu. Z

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[170]Oliver Morsdorf, 'The Legal Mobility of Companies within the European Union through Cross-border Conversions', Common Market Law Review 49, 2012, p. 631.

[171]William W. Bratton, Joseph A. McCahery, and Erik P. M. Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis' (January 2008). ECGI - Law Working Paper No. 91/2008; Georgetown Law and Economics Research Paper No. 1086667; Amsterdam Center for Law & Economics Working Paper No. 2008-01.

[172]Consultation and Hearing on Future Priorities for the Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the European Union summary report of July 2006, available online at http://ec.europa.eu/internal_market/company/consultation/index_en.htm

právního hlediska má společnost povinnost v hostitelském ČS zřídit pobočku, která má být zapsána v příslušném rejstříku hostitelského ČS v souladu s pravidly stanovenými 11. směrnicí o právu obchodních společností.[173] Fakticky tato „pobočka" může být reálným ústředím ekonomické činnosti společnosti, nebo dokonce jediným místem provozu celé společnosti. V tomto případě společnost nespojuje s domovským ČS nic víc než sídlo (z toho plyne název „*letterbox company*" – volně přeloženo jako společnost v poštovní schránce).

Současná judikatura definuje určité limity pro existující firmy, které chtějí emigrovat do jiného členského státu.[174] Z tohoto důvodu přeshraniční mobilita byla dosud omezena pouze na fázi založení společnosti. Ze stejného důvodu nedošlo k žádné masivní vlně migrace existujících etablovaných společností. Možnost přemístění stávajícího podniku je stále do určité míry nejasné, kvůli koncepčním nedostatkům v rámci judikatury Soudního dvora.[175] Tento aspekt mobility byl spíše v oblasti regulace právními předpisy – poté, co Komise oficiálně upustila od plánů na přijetí 14. směrnice, Evropský parlament se opakovaně pokoušel tento projekt oživit.[176] Komise na začátku roku 2013 zahájila veřejnou konzultaci ohledně potřeby přijetí takové směrnice.[177] V rámci stávajícího právního řádu 11. směrnice o přeshraničních fúzích a článek 8 Statutu evropské společnosti (SE)[178] v současné době

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[173]Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State [1989] OJ L395/36.

[174]Wolf-Georg Ringe, 'Corporate Mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition', University of Oxford Legal Research Paper Series, Paper No 34/2013, June 2013, p. 5.

[175]Wolf-Georg Ringe, 'No Freedom of Emigration for Companies?' (2005) 16 European Business Law Review, p. 621.

[176]European Parliament, Committee on Legal Affairs, 'Draft Report with recommendations to the Commission on cross-border transfers of company seats' 2008/2196 (INI) of 17 October 2008. More recently, European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (2011/2046(INI)), and report of 9 January 2012.

[177]Consultation on the cross-border transfers of registered offices of companies (January-April 2013), see http://ec.europa.eu/internal_market/consultations/2013/seat-transfer/index_en.htm.

[178]Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), [2001] OJ L294/1.

poskytují jediný prostředek přesunu již založené společnosti do jiného ČS, aniž by byla daná společnost zrušena, nebo se musela zaregistrovat jako nová společnost.

4. Firemní mobilita a problém autonomie v evropském právu obchodních společností

Soudní dvůr opakovaně uznal skutečnost, že společnosti jsou tvory národního práva ČS („creatures of national law"). Z toho vyplývá, že je na členských státech, aby určily podmínky, za kterých jsou společnosti zakládány a za kterých jsou schopny fungovat. Tato výsada členských států zahrnuje možnost definovat tzv. spojující prvky, které jsou nezbytné pro usazení a existenci společnosti v konkrétním ČS v souladu s jeho právními předpisy. Nicméně to neznamená, že si členské státy ponechávají pravomoc stanovit veškeré podmínky, které regulují usazování společností působících v rámci Evropské unie. Je potřeba vyhledat rovnováhu mezi právem států regulovat firmy na svém území a ekonomickými svobodami zaručenými evropským právem. Rovnováha mezi právy ČS a individuální autonomií je zvláště problematická oblast mezinárodního práva soukromého v případě obchodních společností, protože na rozdíl od mnoha jiných oblastí občanského a obchodního práva, velikost role států či jednotlivců v regulaci obchodních společností zůstává přinejmenším sporná.[179] Členským státům se dosud nepodařilo vytvořit společnou koncepci struktury práva společností vzhledem k odlišným názorům týkajících se konkrétních zájmů, které by měly být chráněny takovým právním rámcem. Jako příklad lze uvést, že některé členské státy pohlížejí na právo obchodních společností především jako na disciplínu, která se zabývá vztahem mezi společníky a jednateli, zatímco jiné státy do toho zahrnují i další oblasti jako pracovní právo a mechanismy tykající se správy a řízení společností.[180] Spojené království je ukázkovým příkladem první skupiny, zatímco Německo je vzorovým příkladem druhé skupiny. Přílišná odlišnost mezi právními předpisy členských států a mezi jejich koncepcemi korporátní právní

[179]Clive M. Schmitthoff, 'Company Structure and Employee Participation in the EEC-the British Attitude' (1976) ICLQ p. 611.

[180]Gian Antonio Benacchio and Lesley Orme (trans), 'The Harmonization of Civil and Commercial Law in Europe', Central European University Press 2005, pp. 365-371.

teorie ztěžuje úkol minimalizace rozdílů prostřednictvím harmonizace základních institutů práva obchodních společností. V důsledku těchto základních neshod, autonomie vůle ohledně volby rozhodného práva obchodních společností v EU zůstává hluboko pod svým potenciálem.[181]

5. Důsledky rozhodnutí VALE

Jednou z novot, kterou přináší rozhodnutí VALE oproti předchozí judikatuře, je argumentace principem ekvivalence a principem efektivity. Zatímco v rozhodnutí SEVIC (2005) Soudní dvůr uvedl, že pravidla pro vnitrostátní fúzi by měla být použitelná i na přeshraniční fúze a operuje konceptem rovnocennosti, zásada efektivity v tomto případě zcela chyběla, a je rozvinutá až v odůvodnění rozhodnutí v případě VALE.[182]

Princip ekvivalence znamená, že procesní pravidla určená k zajištění ochrany práv nabytých podle právních předpisů EU by sice měla být určována národním právem členského státu, ale pouze pod podmínkou, že tato pravidla nebudou méně příznivá než ta, kterými se řídí obdobné případy vnitrostátní povahy. Zásada efektivity navíc určuje, že tato procesní pravidla nesmí v praxi znemožňovat nebo nadměrně ztěžovat výkon práv zaručených evropským právem.[183] Tyto zásady byly použity Soudním dvorem v případech týkajících se mimo jiné práva na náhradu škody a práva na vrácení neoprávněně vybraných poplatků.[184] Na základě těchto principů se společnost zamýšlející přeshraniční přeměnu může spolehnout na pravidla hostitelského ČS platná pro obdobné vnitrostátní přeměny. Na první pohled to zní jako poměrně jasná a jednoduchá konstrukce, ale zavedení zásad rovnocennosti a efektivity v

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[181]John Paterson, 'The Company Law Review in the UK and the Question of Scope: Theoretical Concerns, Practical Constraints and Possible New Directions' in Robert Cobbaut and Jasques Lenoble (eds), Corporate Governance. An Institutional Approach (Kluwer Law International 2003), p. 141.

[182]Christoph Teichmann, 'Der Grenzüberschreitende Formwechsel ist spruchreif: das Urteil der EuGH in der RS. Vale', Der Betrieb, 2012.

[183]Dániel Gergely Szabó and Karsten Engsig Sørensen, 'Cross-border conversion of companies in the EU: the impact of the VALE judgement', 2013, LSN Research Paper Series, No. 10-33, p. 9.

[184]Takis Tridimas, 'The General Principles of EU Law', Second Edition, 2006, pp. 418-475.

oblasti evropského práva obchodních společností vyvolává řadu velmi závažných otázek, a to jak z hlediska práva obchodních společnosti obecně tak i z hlediska jiných právních oblastí, jako například daňového práva. Zásady rovnocennosti a efektivity bez podpory v sekundárním právu jsou velmi vágním konceptem.[185]

První otázka se týká toho, jaký konkrétní druh domácí konverze by měl posloužit ekvivalentem pro přeshraniční přeměnu dané společnosti. V případě VALE italská společnost s ručením omezeným má být přeměněna na maďarskou společnost s ručením omezeným. Nicméně, maďarské právo neobsahuje možnost „převodu" společnosti s ručením omezeným na stejný typ společnosti, a není pravděpodobné, že právní řády ostatních členských států předvídají možnost takové přeměny. V takovém případě je zásada rovnocennosti absolutně nepoužitelná. To by znamenalo, že nelze uskutečnit přeshraniční přeměnu společnosti do odpovídajících forem společnosti, ale pouze do jiných forem společnosti, které mají upraven postup takové transformace v národním právu hostitelského členského státu. Je zřejmé, že takový výklad rozhodnutí VALE je neudržitelný, neboť fakta daného rozhodnutí jasně ukazují, že konverze ze společnosti s r.o. v jednom členském státě do společnosti s r.o. v jiném členském státě by měly být chráněny.

Druhý problém se týká ochrany zájmů věřitelů, menšinových společníků a zaměstnanců. Není zcela jasné, zda mají být použita pravidla (regulující obchodní společnosti) domovského ČS, hostitelského ČS, nebo obou současně. Na jedné straněSoudní dvůr jasně uvádí, že maďarské právní předpisy týkající se požadavků na vypracování seznamu aktiv a závazků a inventárního soupisu majetku mají být použity.[186] Soudní dvůr tudíž potvrzuje dříve formulovanou zásadu, že se na konverzi společností použije to právo obchodních společností hostitelského ČS, které mimo jiné reguluje ochranu zájmů věřitelů, menšinových společníků a zaměstnanců. Současně ale Soudní dvůr stanoví, že odpovědné orgány hostitelského ČS musí brát v úvahu dokumenty získané od orgánů domovského ČS ve vztahu k převodu. Aby získala tyto

[185]Karsten Engsig Sørensen & Mette Neville, 'The Internationalisation of Companies and Company Laws', The Columbia Journal of European Law, 2000 p. 197.

[186]VALE, supra note 4, para 52.

dokumenty, společnost musí jednat v souladu s ustanoveními obchodního práva domovského ČS, z nichž některé se mohou rovněž týkat ochrany zájmů věřitelů, menšinových společníků a zaměstnanců.[187] Soud tedy nepřímo umožňuje situaci, kdy oba dotčené ČS mohou uplatňovat svá vlastní pravidla pro konverze společnosti. Kromě skutečnosti, že paralelní používání dvou souborů právních předpisů vede ke zvýšení časové a finanční náročnosti konverze, může také nastat situace, kdy daná konverze bude úplně znemožněna, protože společnost nebude reálně schopna dodržovat ustanovení obou právních řádů najednou.[188] Dále je zajímavé zamyslet se nad tím, že i když oba státy náležitě chrání např. postavení minoritních akcionářů, aplikovaná pravidla stále nemusejí poskytovat dostatečnou ochranu věřitelům a akcionářům konvertující společnosti, neboť tato opatření jsou většinou určená pro národní režim přeměn.

Třetí problém souvisí s otázkou, kdy by měla být společnost smazána z evidence v příslušném rejstříku domovského ČS, a kdy by měla nová společnost vzniknout a být registrována podle právních předpisů hostitelského ČS. Generální advokát Jääskinen poukazuje ve svém názoru, že původní společnost by měla i nadále existovat i po vzniku nové společnosti, a to jak v podle práva hostitelském ČS, tak podle práva domovského ČS a podle odpovídajících ustanovení evropského práva.[189] Z tohoto důvodu je potřebná vysoká míra koordinace a spolupráce mezi odpovědnými orgány jednotlivých členských států, jinak by „upustili vejce“ v období mezi výmazem společnosti z rejstříku domovského ČS, a registrací nové společnosti v hostitelském ČS.

Čtvrtou otázkou je problém tzv. spojovacích prvků. Soud zdůrazňuje, že hostitelský členský stát může stanovit spojovací prvek pro přemísťující se společnost.[190]Prostřednictvím tohoto instrumentu může hostitelský členský stát uplatňovat požadavky tykající se reálné hospodářské aktivity společnosti, pokud se v daném státě aplikuje teorie reálného sídla. Není

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[187]VALE, supra note 4, para 58.

[188]VALE, supra note 4, para 48.

[189]Opinion of Advocate General Jääskinen delivered on 15 December 2011 in Case C-378/10 VALE Építési kft. ECR 00000., para 52.

[190]VALE, supra note 4, para 29.

zcela zřejmé, zda domovský ČS může prosadit požadavek na skutečné sídlo do té míry, že odmítne výmaz společnosti ze svého rejstříku, dokud společnost má své skutečné sídlo v tomto (domovském) členském státě. Pokud by to bylo možné, může členský stát použít teorii skutečného sídla, aby se bránil odlivu společnosti způsobeného založením „fiktivního" sídla v jiném ČS při zachování rozhodující ekonomické aktivity v domovském ČS. Nicméně, vzhledem k tomu, že společnost by se nacházela v procesu změny rozhodného práva, musí být na hostitelském členském státě, aby rozhodl o potřebném spojovacím prvku.

6. Přeshraniční přeměny a potřeba harmonizace

Aby bylo možné dovolávat se svobody usazování ve smyslu článku 52 a násl. SFEU,společnost musí dle judikatury Soudního dvora provozovat v daném státě hospodářskou činnost prostřednictvím stálé provozovny. I když někteří autoři tvrdí, že takový požadavek nemůže být dostatečně odůvodněn žádným ustanovením SFEU samotné, takový výklad postupně získal status ustáleného pravidla právě na základě argumentace Soudního dvora. V případě konverze doprovázené přemístěním reálného sídla je takový požadavek snadno proveditelný, a to vzhledem k povaze přeměny samotné, kdy společnost sleduje pouze usnadnění inkorporace ve státě, ve kterém již vykonává nebo hodlá vykonávat reálnou ekonomickou aktivitu. Problém představuje případ, kdy změna sídla je prováděna pouze za účelem změny rozhodného práva (tj. bez reálné ekonomické angažovanosti v hostitelském státě, tzv. izolované přeshraniční přeměny). Mörsdorf je toho názoru, že nedostatek obchodního spojení s hostitelským členským státem brání této izolované formě přeshraniční konverze před zahrnutím do ochrany v rámci svobody usazování. Stejnou pozice zastává řada německých autorů, a to Behrens, Kieninger a Zimmer.[191] Naopak Szydlo[192] a Freitag[193] tvrdí,

[191]Respectively, Peter Behrens, 'Das Internationale Geselschaftrechts nach dem Centros-Urteil des EuGH', Praxis des InternationalesPrivat- und Verfahrungsrecht (IPRAX), 1999, p. 330; Eva-Maria Kieninger, 'Wettbewerb der Privatrechtsordnungen im Europaishe Binnenmarkt', Mohr Siebeck, 2002, p. 159; Daniel Zimmer, 'Grenzuberschreitende Rechtspersonlichkeit', Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht, Vol. 168, No. 3, 2004, p. 367.

že izolované přeshraniční konverze jsou v souladu s požadavky na dovolávání se svobody usazování a měly by jí být chráněny. Zvláště Szydlo zdůrazňuje případy Centros a Inspire Art, kdy společnostem, které byly formálně zřízené podle právních předpisů jednoho členského státu, ale podnikaly výhradně v jiném členském státě, byla poskytnuta úplná ochrana na základě ustanovení o svobodě usazování. Tyto podpůrné hlasy zřejmě zahrnují i Evropský parlament, který nedávno vyjádřil názor, že by pravidlo vyžadující přemístění reálného ekonomického sídlo společnosti do hostitelského ČS, obsažené v sekundárním právu, představovalo porušení zásady svobody usazování.[194] Neochota některých autorů subsumovat mobilitu společností a zejména jejich právní mobilitu pod ochranu zaručenou ustanoveními o svobodě usazování je přinejmenším znepokojující. Koncept právní mobility je plnohodnotně rozvinut např. v USA a jednoznačně přispívá k udržitelným ekonomickým výhodám vyplývajícím z benevolentní doktríny mobility společností.

Je zřejmé, že dosavadní judikatura neposkytuje jasnou odpověď dokonce na základní otázku o povaze přeshraničních konverzí, kterou Soudní dvůr hodlal zachytit pod rámec svobody usazování. Navíc rozhodnutí neřeší důležité otázky kolizních norem a ochrany dalších zainteresovaných stran, které by měly být vyřešeny při těchto transakcích.

Cartesio a VALE a jejich důsledky velmi jasně ukazují, že koordinované legislativní úsilí na úrovni EU je nezbytné pro další rozvoj svobody usazování společností.[195] Ani právní jistoty, ani procedurální efektivnosti nelze dosáhnout pouhým odkazováním na „přímý účinek" primárního práva, který přestože brání uplatnění přísnějších vnitrostátních pravidel v jednotlivých případech, neposkytuje komplexní soubor pravidel, který by sloužil jako alternativa k těmto restriktivním vnitrostátním předpisům. Musíme také vzít v úvahu náklady

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[192]Marek Szydlo, 'The Right of Companies to Cross-border Conversion under the TFEU Rules on Freedom of Establishment' European Company and Financial Law Review. Volume 7, Issue 3, 2010, p. 423.

[193]Robert Freitag, 'Der Wetbewerb der Rechtsordnungen im Internationalen Gesellschaftsrecht', Europäische Zeitschrift für Wirtschaftsrecht 1999, p. 269.

[194]Parliament resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company (2008/2196(INI)).

[195]Gert-Jan Vossestein, 'Transfer of the Registered Office. The European Commission's Decision Not to Submit a Proposal for a Directive, Utrecht Law Review, Volume 4, Issue 1, 2008, p. 123.

spojené s provozováním zahraniční společnosti a s dodržováním pravidel evidence a zveřejňování v jednotlivých členských státech. Konvertující společnosti se také setkávají s vysokými náklady společenského uznání a pověsti jak v domovském, tak i v hostitelském státě. Netřeba dodávat, že právní jistota má zásadní význam v tomto konkrétním případě přeshraničních převodů, které sebou obnášejí vysoké náklady a obtíže.

7. Závěr

Kauzy VALE a Cartesio připravily cestu pro nový typ přeshraniční transakce, který umožní společnostem efektivně změnit rozhodné právo po převedení svého sídla do jiného členského státu. Tento vývoj v doktríně korporátní mobility lze chápat jako posílení práv poskytovaných v rámci svobody usazování dle ustanovení článku 49 Smlouvy o fungování EU. Většina zkoumaných autorů uznává význam vlivu rozhodnutí zejména pro jasné potvrzení toho, že právo na přeshraniční přeměny je garantované a přímo aplikovatelné na základě primárního práva, tudíž daný typ transakce má být umožněn do té míry, do které jsou obdobné převody povoleny podle vnitrostátních právních předpisů hostitelského členského státu. Soudní dvůr dále potvrdil, že kromě možnosti zvolit si rozhodné právo založením nové společnosti nebo měnit toto právo prostřednictvím přeshraniční fúze, mohou společnosti nyní své rozhodné právo změnit v jednom kroku právě skrze přeshraniční přeměnu. Tento vývoj je obecně vítán, i když někteří autoři poukazují na nesrovnalosti v dosavadní soudní doktríně.

Je jisté, že tato rozhodnutí budou vyžadovat úpravu právních systémů a postupů v případě většiny členských států. Členské státy si již delší dobu uvědomují, že přeshraniční přeměny vyžadují lepší ochranu věřitelů, menšinových společníků a zaměstnanců, a proto je nutné stanovit jasná a dostatečně konkrétní pravidla pro přeshraniční reorganizace. To určuje potřebu členských států koordinovat vytvoření účinného systému, který by umožnil přeshraniční přeměny, a to nejen z hlediska práva obchodních společností, ale také například z daňového hlediska, nebo hlediska pracovněprávního. I když komunikace ohledně daného tématu mezi členskými státy probíhá a nelze si nevšimnout snahy o jednotný postup ve věci, je třeba poznamenat, že dle empirických výzkumů se v praxi ukazuje jako velmi obtížné

provádět přeshraniční přeměny a další typy reorganizací s přeshraničním prvkem, protože přesné pokyny pro řešení případných konfliktů na celoevropské úrovni chybí. To i nadále zůstává největším problémem a pokud zvážíme nejasnosti zanechané rozhodnutím VALE, je obtížné pochopit, proč se Komise ve svém posledním akčním plánu nezavázala k obnovení práce na 14. směrnici v oblasti práva společností.[196]

Kromě výše poznamenaného existuje ještě řada koncepčních problémů. Členské státy nedokázaly dospět ke společnému chápání samotných cílů korporátního práva a způsobu regulace přeshraniční mobility společností. V důsledku toho je trh pro přeshraniční mobilitu stále poměrně chaotickým prostorem ve stavu, kdy právní předpisy EU neposkytují jasný rámec pro nadnárodní regulaci společností. Tato situace nakonec vyústila v nadměrné spoléhání na Soudní dvůr v průběhu posledních 40 let. Bohužel Soudní dvůr sám o sobě není schopen vytvořit právní a administrativní rámec pro podporu hospodářských svobod, která jeho rozhodnutí opakovaně přiznávají a potvrzují. Jeho judikatura dále selhává ve vypořádání se s různorodými politickými zájmy členských států – to vysvětluje přetrvávání abnormálního omezení autonomie vůle stran, které není přínosné pro firemní subjekty ani pro rozvoj svobod zaručených primárním právem, aniž by přitom byla věnována dostatečná pozornost potřebě jasného legislativního rámce. Neochota Soudního dvora definitivně objasnit zbývající rozpory v judikatuře potvrzuje, že negativní harmonizace představuje neúčinný nástroj regulace obchodního práva a dále posiluje argument pro vytvoření komplexní a systematické právní úpravy, která by účinně vyřešila všechny zbývající otázky.

Z provedeného výzkumu vyplynulo, že současný právní rámec pro přeshraniční přeměny, který je založen pouze na ustanoveních primárního práva, se jeví jako nedostatečný pro praktickou aplikaci daných transakcí. I když judikatura SDEU v oblasti mobility společností byla vlivná a efektivně nastavila nosné prvky doktríny v daném oboru, sama o sobě není schopná kompenzovat neexistenci nezbytných obecně závazných normativních předpisů na úrovní sekundárního práva. Podle očekávání, zkoumaná akademická debata potvrdila v úvodu formulovanou hypotézu, a jednoznačně se shodla na naléhavosti potřeby další legislativní

[196]Jesper Lau Hansen, 'The Vale Decision and the Court's case law on the nationality of companies', European Company and Financial Law Review, Volume 10, Issue 1, 2013, p. 12.

činnosti na evropské úrovni. Nicméně rozsah takové harmonizace a jeho explicitní obsah, zejména v oblasti identifikovaných právních nedostatků a problémů, zůstal převážnou většinou autorů opomenut a skýtá tedy zajímavou příležitost k dalšímu zkoumání problematiky.

Key words

Key words:

corporate mobility, cross-border conversion, EU, freedom of establishment

Klíčová slova:

mobilita společností, přeshraniční přeměna, EU, svoboda usazování